

# MANUAL FOR ADMINISTRATIVE LAW JUDGES



Administrative Conference of the United States  
3rd edition 1993

## Administrative Conference of the United States

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The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy, and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished by direct action on the part of the affected agencies or through legislative changes.

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**MANUAL  
FOR  
ADMINISTRATIVE  
LAW JUDGES**

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**Administrative Conference of the United States  
3rd edition 1993**



# TABLE OF CONTENTS

PREFACE - 1993 Edition .....	v
PREFACE - 1982 Edition .....	ix
I. Introduction .....	1
A. General Overview .....	2
B. Specific APA Powers of the Administrative Law Judge.....	5
C. Alternative Dispute Resolution and Administrative Law.....	7
1. General Background.....	7
2. Relevance of ADR to Administrative Law Judges .....	8
3. Confidentiality .....	13
4. The Extension of ADR into Administrative Law.....	16
II. Prehearing Conferences & Settlements .....	18
A. Preparation for Prehearing Conference, With Emphasis on Complex, Multiparty Proceedings.....	20
B. Notice.....	20
C. Conference Transcript .....	21
D. Management of the Conference .....	22
E. Conference Report.....	25
F. Preliminary Motions and Rulings .....	25
G. Other Prehearing Procedures .....	26
H. Settlement Negotiations and ADR Possibilities.....	27
1. Settlements.....	27
2. ADR .....	29
III. Discovery.....	29
A. Subpoenas .....	30
B. Discovery and Confidential Material .....	31
C. Testimony of Agency Personnel and Production of Agency Documents .....	32
D. Reports, Estimates, Forecasts, and Other Studies.....	33
E. Polls, Surveys, Samples, and Tests .....	34
IV. Prehearing Techniques for Expediting and Simplifying the Complex Proceeding .....	34
A. Written Exhibits in Complex Cases .....	40
B. Elimination or Curtailment of Hearing Suspensions .....	41
C. Stipulations and Official Notice of Documentary Material .....	42

D. Intervention and Participation by Nonparties .....	42
E. Joint Presentations .....	44
F. Organizing the Complex or Multiparty Hearing .....	45
G. Special Committees .....	46
H. Telephone or Videophone Conference .....	46
I. Additional Conferences .....	47
J. Trial Briefs or Opening Statements .....	47
K. Interlocutory Appeals .....	47
L. Mandatory Time Limits .....	48
M. Summary Proceedings .....	49
N. ADR .....	50
V. Hearing .....	51
A. Preparation .....	51
1. Notice .....	51
2. Place of Hearing .....	51
3. Hearing Facilities .....	52
B. Mechanics of the Hearing .....	53
1. Transcript .....	54
2. Convening the Hearing .....	55
3. Trying the Simple Case .....	56
a. Opening Statement .....	56
b. Direct Presentation .....	56
c. Cross-examination .....	57
d. Miscellaneous .....	58
4. Trying the Complex Case .....	59
a. Direct Presentation .....	60
b. Receipt of Exhibits .....	61
c. Cross-examination .....	61
d. Rebuttal Testimony .....	62
e. Redirect .....	63
f. Multiple Witness Testimony .....	63
g. Questions by the Judge .....	65
h. Closing the Presentation .....	66
5. Rules of Evidence .....	66
a. Hearsay .....	68
b. Best Evidence .....	68
6. Offers of Proof .....	68
7. Constitutional Privileges: Self-Incriminating Testimony, Search and Seizure, and Suppression of Evidence .....	69
8. Argument on Motions and Objections .....	70

9.	Confidential Information .....	70
a.	Methods of Handling Confidential Material .....	70
b.	<i>In Camera</i> or Closed Sessions .....	72
10.	Supplemental Data .....	74
11.	Mechanical Handling of Exhibits.....	74
C.	Concluding the Hearing .....	75
1.	Oral Argument .....	75
2.	Conferences .....	75
3.	Briefs .....	75
4.	Notice of Subsequent Procedural Steps .....	76
5.	Closing the Record .....	76
6.	Correcting the Transcript.....	76
D.	Retention of Case Files.....	77
VI.	Techniques of Presiding .....	77
A.	Preparation and Concentration .....	77
B.	Judicial Attitude, Demeanor, and Behavior .....	78
C.	Controlling the Hearing .....	79
D.	Some Common Problems .....	80
E.	Off-the-Record Discussions .....	81
F.	Hearing Hours and Recesses .....	82
G.	Audiovisual Coverage .....	82
1.	Physical Interference.....	85
2.	Interference with the Dignity of Proceedings .....	85
3.	Psychological Distraction .....	85
H.	Taking Notes.....	86
VII.	Conduct.....	87
A.	Disciplinary Actions Against ALJs .....	90
B.	Confidentiality .....	94
C.	<i>Ex Parte</i> Communications.....	95
D.	Bias and Recusal.....	97
E.	Fraternization.....	97
F.	Individual Requests for Information .....	98
G.	Interaction with Other Independent Officers .....	98
H.	The Media .....	99
VIII.	The Decision.....	99
A.	Oral Decision .....	100
B.	Written Decision.....	101
1.	Format.....	102

2. Research .....	105
3. The Decisional Process .....	106
4. Style .....	110
C. Writing the Decision .....	112
1. Brevity .....	114
a. Needless Words .....	114
b. Short Simple Words .....	114
c. Redundant Phrases .....	115
d. Short Sentences.....	115
e. Paragraphs.....	117
2. Punctuation .....	117
3. Active or Passive Voice .....	117
4. Ambiguity .....	118
5. Stylistic Quirks .....	119
a. Elegant Variation.....	119
b. Litotes .....	119
c. Genderless English.....	120
6. Miscellaneous .....	120
a. Names.....	120
b. Technical Terms.....	121
c. Attribution .....	121
d. Speech Tags.....	121
e. Ellipsis.....	122
f. Latin Terms .....	122
7. Being Clever .....	122
8. Rewriting .....	123
Appendices.....	125
Appendix I.....	127
Appendix II.....	205
Appendix III.....	207
Appendix IV.....	209
Appendix V.....	229
Appendix VI.....	233

## PREFACE - 1993 Edition

Revising this Manual for Administrative Law Judges, which was originally written by an administrative law judge of Merritt Ruhlen's stature, presented a unique challenge. There was a natural reluctance to tamper with the voice of experience. Moreover, Judge Ruhlen's book had become something of a standard in its field. An article in one law journal described it as "an admirable handbook [which] reflects his long experience. . . with the CAB."<sup>1</sup> In fact, Judge Ruhlen's Manual has been cited in several scholarly articles<sup>2</sup> and in a number of agency and administrative law judge decisions.<sup>3</sup> Recognizing this, the present edition has tried to leave intact as much of the original as possible. Special efforts have been made to preserve the spirit of Judge Ruhlen's text, and sometimes the exact words, where they address the actual process of judging and conducting administrative proceedings.

However, important changes in administrative law have occurred since 1982. For instance, the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990), incorporated alternative dispute resolution (ADR) into federal administrative law and amended the Administrative Procedure Act to remove any doubt that ADR could be an integral part of agency adjudications.

Even before that watershed, the administrative adjudication landscape had changed significantly. Legislation had reduced several agencies' economic

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<sup>1</sup>Allen, *Twilight or Just an Overcast Afternoon*, 1986 DUKE L.J. 276, 278, n. 10.

<sup>2</sup>Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261,356, n.357; Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, n.4 (1986); Graham, *Evidence and Procedure for the Future: Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353, 370, n. 125; Kauper, *Note: Protecting the Independence of Administrative Law Judges: A Model Administrative Law Judge Corps Statute*, 18 U. MICH. J.L. REF. 537, n. 1 (1985); Whiteside, *Comment: Administrative Adjudications: An Overview of the Existing Models and Their Failure to Achieve Uniformity and a Proposal for a Uniform Adjudicatory Framework*, 46 OHIO ST. L.J. 355, 371, n.139 (1985).

<sup>3</sup>*E.g.*, In the Matter of Benedict P. Cottone, 63 FCC 2d 596, 605 (1977) (citing 1974 edition of the Manual); D. Federico Co., 3 OSHRC (BNA) 1970, 1971, 1975-76 (1976) (Occupational Safety & Health Review Commission: majority citing 1974 edition of the Manual, describing it as "[a] highly respected guide for Administrative Law Judges," at 1971, and dissent citing other passages from the Manual); Emery Richardson v. Department of Justice, 11 MSPR 186, Docket No. SF07528110018 (1982); Department of Veteran's Affairs, Veterans Administration Medical Center, Boise, Idaho (Respondent) and AFGE, Local 1273 (Charging Party/Union), 40 FLRA 992, Case No. 9-CA-90575 (1991) (ALJ decision).

regulatory authority over such matters as routes, rates, and licensing in industries such as trucking (Motor Carrier Act, Pub. L. No. 96-296, 92 Stat. 793 (1980)), the railroads (Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980)), and natural gas (Natural Gas Policy Act, Pub. L. No. 95-621, 92 Stat. 335 (1978)). Under the Airline Deregulation Act, Pub. L. No. 95-204, 92 Stat. 1705 (1978), route and price regulation in the airlines industry met the same fate, and Judge Ruhlen's old agency (the Civil Aeronautics Board (CAB)) was phased out.

These enactments hastened an ongoing evolution in administrative law. The number and type of cases decided by administrative law judges had already changed drastically between 1946 and the 1980s. In 1946, there were fewer than 200 federal administrative law judges (then hearing examiners) and 60 percent of these were employed by agencies engaged primarily in the regulation of routes, rates, and other economic aspects of various industries.<sup>4</sup> After 1982, there were almost 1,200 federal administrative law judges, but only about 7 percent of them were in the old-line regulatory agencies. More than 90 percent were employed in agencies where contested benefits claims and law enforcement adjudications were the norm,<sup>5</sup> agencies such as the Social Security Administration, the U. S. Department of Labor, the National Labor Relations Board, and the Occupational Safety and Health Review Commission.

Since 1982, the center of gravity for cases decided by administrative law judges has continued to shift away from economic regulatory agencies such as the old CAB, the ICC, and the FCC.<sup>6</sup>

Revisions to Judge Ruhlen's 1982 edition of the Manual were therefore needed. In fact, these revisions became somewhat more extensive than originally planned. In many respects, it simply was not enough to update citations and revise the 1982 text to correlate with current practices. Too many changes and too much evolution had occurred since 1982.

Nevertheless, Judge Ruhlen's 1982 Manual was not necessarily obsolete. Although much of the 1982 edition refers to agencies like the CAB, and much of it speaks in the immediate context of economic regulation cases, the process of judging remains at the center of the book. Complex, multi-party cases are not limited to litigation over rates, licenses, and routes. Judge Ruhlen still provided a sound point of departure and sound ideas concerning how to manage complex, difficult cases. That is where the need for a Manual for Administrative Law Judges is most acute. And that is one reason why

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<sup>4</sup>Lubbers, *A Unified Corps of ALJs: a Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 268-69 (Nov. 1981).

<sup>5</sup>*Id.*, at 785.

<sup>6</sup>Holmes, *ALJ Update: A Review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges*, 38 FED. B. NEWS & J. 202 (May, 1991).

special efforts were made, despite considerable revision and updating, to preserve much of Judge Ruhlen's text. Moreover, Judge Ruhlen's insights into the process of judging can be helpful to many other hearing officers--whatever their title and status--who adjudicate and conduct evidentiary hearings in federal and state agencies. General principles and techniques can be adapted to a wide range of particular statutes, rules, and situations. Therefore, this Manual is intended to be helpful to any person charged with the duty of conducting an evidentiary hearing.

Now for the customary acknowledgments and thank yous. (That these acknowledgments are traditional in no way reduces the sincerity with which they are expressed.) As always, the staff of the Administrative Conference has gone out of its way to be helpful and responsive to the needs of the revision process. Special thanks are extended to Jeffrey Lubbers, Research Director at the Administrative Conference and to Sandra Shapiro of DHHS who served as visiting senior executive at the Conference in 1992-93. Several administrative law judges have been particularly helpful, and at some risk of inadvertent omission, let me mention in particular Acting Chief Administrative Law Judge Jose A. Anglada (SSA), Judge Ivan Smith (NRC), Chief Administrative Law Judge Curtis Wagner (FERC), and Deputy Chief Administrative Law Judge John Vittone (USDOL). Thanks also are in order for Peter Dowd, Director, Division of Field Practices and Procedures (SSA), and Judge Moody R. Tidwell, U.S. Court of Federal Claims.<sup>7</sup> This list would be incomplete, of course, without appropriately recognizing Danny R. Williams, a tireless research assistant (and third-year student at U of Arkansas Little Rock School of Law), Melba Myers for all of that "hurry-up-I-need-it-now" secretarial support earlier in this project, and Juaniece Ammons for her help in completing it.

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*June 1993*

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<sup>7</sup>See *infra* note 102, concerning use of the designation "U.S. Court of Federal Claims."



## PREFACE - 1982 Edition

Since the Manual was published in 1974, formal administrative law has continued to expand and the use and functions of administrative law judges have increased. In February 1974 there were 22 agencies employing 792 administrative law judges; as of June 1981 there were 29 agencies employing 1119 judges. In addition, the number of administrative law judges in state, county, and city governments has continued to grow.

Recent experience suggests a need for a greater variety in methods and practices for the conduct of formal administrative proceedings: for example, greater use of voluntary conferences to reach agreement on both major issues and trial procedures, stricter time limits for processing a formal proceeding, and increased use of summary judgment. In addition, use of telephone conferences, multiple witness testimony, and broadcast coverage of hearings have increased.

This Manual discusses and explains some of these changes. It also includes a new section on judicial writing which we hope will encourage judges to concentrate on making their decisions say what they mean.

Like the original Manual, the revision was written with "the typical formal administrative proceeding" in mind. However, it now includes new sections designed for special types of cases, such as short cases with few parties and issues, and long technical cases with many parties or issues or both.

Although the use of administrative law judges has expanded both in the federal government and in many state and local governments, the basic function remains the same regardless of jurisdiction. Consequently, this volume is still limited to general procedural techniques applicable to most agencies in all jurisdictions. However, each agency will have its own unique problems and procedures which must be handled by that agency's judges. Where the number of formal administrative hearings and the number of administrative law judges justify it, each agency should establish and periodically revise its own formal procedural Manual.

The staff of the Administrative Conference of the United States has given me complete support and help. The substantive and editorial help of Jeffrey S. Lubbers and David M. Pritzker was invaluable.

All of the administrative law judges from whom I sought help went out of their way to assist me. A few of those on whom I relied most heavily were Warren Blair, Philip T. Brown, Donald Duvall, Lenore Ehrig, William Fowler, Jr., Reuben Lozner, John J. McCarthy, Robert Mullin, Joseph Saunders, Seymour Wenner, and Ronnie A. Yoder. In addition, Professors

Frances Peavoy and James Shelton and Judge Walter C. Miller gave me excellent editorial suggestions. I also thank my wife, Florence, and Sharon Anderson for the essential typing and translation of the original drafts, and Patricia Mullins for editorial assistance.

I also received substantial help from Judge Dyer Justice Taylor of the Superior Court of the District of Columbia, and state Administrative Law Judges Delphene Strickland of Florida, Lois Smith and Daniel G. Berk of Michigan, George A. Beck, Myron Greenberg, and Duane R. Harves of Minnesota, and Howard J. Kestin of New Jersey.

The Office of Administrative Law Judges in the Office of Personnel Management, the Federal Administrative Law Judges Conference, the American Bar Association Conference of Administrative Law Judges, Paul Nejelski of the American Bar Association, and numerous agency staff and private practitioners also provided information and assistance.

**NOTE:** This preface was prepared by Merritt Ruhlen on April 1, 1982.

# I. Introduction

Today, the powers and responsibilities of federal administrative law judges are defined in the Administrative Procedure Act<sup>1</sup> and in the enabling acts and procedural rules of the various agencies.<sup>2</sup> Their powers, duties, and status have been considered on several occasions by the federal courts.<sup>3</sup>

Historically, however, the need for administrative hearing officers was recognized well before the Administrative Procedure Act.<sup>4</sup> The large number of cases where an agency was required, statutorily or constitutionally, to afford a hearing impelled federal agency heads to delegate responsibility for conducting those hearings to subordinates.<sup>5</sup> However, these subordinates were subject to the direction and control of the agency, and thus perceived as being prone to make findings favorable to the agency. Considerations of fairness led to granting these hearing officers increasing degrees of independence, culminating in the provisions of section 11 of the Administrative Procedure Act (APA),<sup>6</sup> which accords the administrative law judge<sup>7</sup> a unique status.<sup>8</sup>

Although an employee of the agency, the judge is responsible for conducting formal proceedings, interpreting the law, applying agency regulations, and carrying out the policies of the agency in the course of

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<sup>1</sup>Administrative Procedure Act, 5 U.S.C. §§551-559, 701-706 set forth, 1305, 1306, 3105, 3344, 5372, and 7521 (1988 & Supp. II 1990); originally enacted as ch. 324, 60 Stat. 237 (1946). This Act is in Appendix VI to this Manual.

<sup>2</sup>A list of citations to the procedural rules of many federal agencies that conduct adjudicative hearings is set forth in Appendix V.

<sup>3</sup>See, e.g., *Butz v. Economou*, 438 U.S. 478 (1978); *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953); *Riss & Co. v. United States*, 341 U.S. 907 (1951); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Benton v. United States*, 488 F.2d 1017 (Ct. Cl. 1973).

<sup>4</sup>See *Morgan v. United States*, 298 U.S. 468 (1936). For a more detailed historical account, see *The Federal Administrative Judiciary*, 1992 ACUS 771 [hereinafter *Federal Administrative Judiciary*], at 798-803.

<sup>5</sup>See *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

<sup>6</sup>5 U.S.C. §§3105, 5372, and 7521 (1988 & Supp. II 1990).

<sup>7</sup>The title was changed to administrative law judge by United States Civil Service Commission regulation on Aug. 19, 1972, 37 Fed. Reg. 16787, and by statute on March 27, 1978, 5 U.S.C. §3105 (1990).

<sup>8</sup>See *Ramspeck v. Federal Trial Examiners Conf.*, 345 U.S. 128, 132 ("a special class of semi-independent subordinate hearing officers"). See also, *Local 134, IBEW v. NLRB*, 486 F.2d 863, 867 (7th Cir. 1973).

administrative adjudications.<sup>9</sup> To ensure independent exercise of these functions, the judge's appointment is absolute. The judge is not subject to agency efficiency ratings, promotions, or demotions; compensation is established by the Office of Personnel Management independent of agency recommendations,<sup>10</sup> and the agency can take disciplinary action against the judge only when good cause is established before and determined by the Merit Systems Protection Board after opportunity for hearing.<sup>11</sup>

## A. General Overview

Before considering some specific APA-recognized powers of the administrative law judge, a general overview may be helpful. To begin with, the administrative law judge is a common feature in formal agency adjudications. Whenever the APA applies to a matter that must be determined on the record of a trial-type hearing, the proceedings are likely to be conducted by an administrative law judge. In fact, the APA is quite explicit. For most proceedings required by statute to be determined on the record after notice and opportunity for an evidentiary hearing:

- (b) There shall preside at the taking of evidence--  
(1) the agency;

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<sup>9</sup>The discussion in this Manual assumes that the administrative law judge is an employee of an agency charged with enforcement and policymaking responsibilities for its substantive program. A small number of agencies that employ administrative law judges hear cases originating in the enforcement programs of other agencies. For example, the Occupational Safety and Health Review Commission (OSHRC) and the Federal Mine Safety and Health Review Commission (FMSHRC) are independent agencies that conduct hearings in enforcement cases brought by the Department of Labor. Accordingly, some of the discussion in the text dealing with the relationship of the judge to the agency is not directly applicable to OSHRC, FMSHRC, or similar agencies.

<sup>10</sup>5 U.S.C. §5372 (1988 & Supp. II 1990). Moreover, amendments in 1990 addressed basic grades and pay levels of administrative law judges (ALJ) and provided that OPM shall determine levels of ALJ positions by regulation. Pub. L. No. 101-509, 104 Stat. 1445, 1446 (1990).

<sup>11</sup>5 U.S.C. §7521 (1988 & Supp. II 1990). Among the cases interpreting or applying this provision are *Benton v. U.S.*, 203 Ct. Cl. 263, 488 F.2d 1017 (Ct. Cl. 1973); *Association of Administrative Law Judges v. Heckler*, 594 F. Supp. 1132 (D. D.C. 1984); *Goodman v. Svahn*, 614 F. Supp. 726 (D. D.C. 1985); *Brennan v. Department of Health & Human Services*, 787 F.2d 1559 (Fed. Cir. 1986), *cert. den.* 479 U.S. 985 (1986); *McEachern v. Macy*, 233 F. Supp. 516 (D. S.C. 1964), *aff'd*, 341 F.2d 895 (4th Cir. 1965). For articles, see Rosenblum, *Contexts and Contents of "For Good Cause" as the Criterion for Removal of Administrative Law Judges: Legal and Policy Factors*, 6 W. NEW ENG. L. REV. 593 (1984); Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807 (1984).

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.<sup>12</sup>

Boards, Commissions, or Administrators heading a federal agency do not routinely preside over hearings. Therefore, the "norm" for formal evidentiary adjudications is to use an administrative law judge.

However, there is an important exception contained in the relevant provision of the APA itself. An administrative law judge is not required if some statute other than the APA provides for hearing before an agency employee other than an administrative law judge.<sup>13</sup> A recent study has indicated that there are a significant number of proceedings where the hearing officer is not necessarily an administrative law judge.<sup>14</sup> Still, the administrative law judge seems to provide a "model," even in such cases. Especially noteworthy, this study pointed out that: (1) such hearing officers often are--like administrative law judges--administratively "housed" in "independent" organizations separate from the rest of the agency;<sup>15</sup> and (2) agencies apparently are willing "to accord these presiding officers a fair degree of independence."<sup>16</sup> As a practical matter, much of this Manual should therefore be relevant to these nonadministrative law judge hearing officers.

Several other general points regarding administrative law judges (judges, or ALJs) should be made at this juncture. In most types of cases the judge issues either an initial or a recommended decision, orally or in writing.<sup>17</sup> The judge's decision is subject to review by the agency (a function sometimes delegated to an agency official or to a review board),<sup>18</sup> and the agency's decision is in turn

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<sup>12</sup>5 U.S.C. §556(b) (1988) (emphasis added).

<sup>13</sup>5 U.S.C. §556(b) (1988) ("This subchapter does not supersede the conduct of specified classes of proceedings. . .before boards or other employees specially provided for. . .under statute.")

<sup>14</sup>Frye, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 264 (1992).

<sup>15</sup>*Id.* at 341-43.

<sup>16</sup>*Id.* at 343.

<sup>17</sup>5 U.S.C. §557(b) (1988). In cases involving rulemaking or initial licenses, the agency may direct that the judge's decision be omitted and the formal record be certified directly to the agency for decision. *Id.*

<sup>18</sup>*See, e.g.,* Northeastern Broadcasting, Inc. v. FCC, 400 F.2d 749 (D.C. Cir. 1968)(FCC Review Board); McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964) (Social Security & Appeals Council); 47 CFR §0.161 (1991)(FCC Review Board); 43 CFR §4.1 (various Department of the Interior appeals boards, e.g., Board of Indian Appeals, Board of Land Appeals).

usually subject to review by the courts.<sup>19</sup> The judge's decision can become final agency action if review is not directed by the head of the agency or other official designated to entertain appeals from the judge's decision.<sup>20</sup>

The administrative law judge is the person primarily responsible for developing an accurate and complete record and a fair and equitable decision in a formal administrative proceeding. The parties to the proceeding, including agency staff, are all subject to pressures and preconceptions that may inhibit objective presentation of facts and policies. The reviewing agencies and the courts, though independent and objective, have heavy workloads and other obligations. They simply do not have the time nor the facilities to investigate all aspects of each formal proceeding. This function has come to be the responsibility of the administrative law judge.

Consequently, an administrative law judge has a strong affirmative duty not only to try a case fairly and to write a sound decision but to ensure that an accurate and complete record is developed.

In *Scenic Hudson Preservation Conference v. Federal Power Commission*, the Second Circuit stated:

[T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission. . . .

The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.<sup>21</sup>

Although the court was referring to an administrative agency and not directly to administrative law judges, the net result is the same. Because the agency itself does not preside over the taking of evidence, the judge, as presiding officer on behalf of an agency, has the initial responsibility for

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<sup>19</sup>5 U.S.C. §§701-706 (1988). However, judicial review can be statutorily precluded, at least in certain kinds of cases. *Lindahl v. OPM*, 470 U.S. 768 (1985); *Webster v. Doe*, 486 U.S. 592 (1988).

<sup>20</sup>*See, e.g.*, 24 CFR §1720.605 (1991)(HUD); 29 CFR §517.511 (1991)(Department of Labor, review of ALJ decisions under Training Wage provisions of the Fair Labor Standards Amendments of 1989); 33 CFR §136.305 (1991)(Coast Guard, Offshore Oil Pollution Compensation Fund claims).

<sup>21</sup>354 F.2d, 608, 620 (2d Cir. 1965).

developing an accurate and complete record.<sup>22</sup> This may require affirmative measures at several stages of a proceeding. The judge certainly should call the attention of the parties to gaps in the record and insist that they be filled. The judge also may need to question or cross-examine a party's witnesses,<sup>23</sup> and may even call witnesses or raise issues *sua sponte* upon essential matters not covered adequately by the parties.<sup>24</sup> The judge may direct the parties to discuss in oral argument, in brief, or in special memoranda during the hearing any issues or points that are germane, and the judge may direct counsel to research a question of law and policy at any time.<sup>25</sup>

If the agency or a court finds omissions in the record, inappropriate procedures, insufficient evidence, or other inadequacies, frequently the case must be returned to the administrative law judge for correction or supplemental action.<sup>26</sup> This, of course, involves additional work, expense, and further delay.

## B. Specific APA Powers of the Administrative Law Judge

Section 556(c) of the APA furnishes a convenient point of departure by listing some of the powers and functions an agency may be authorized to delegate to administrative law judges.<sup>27</sup> Specifically, and in the order listed in

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<sup>22</sup>See *Marsh v. Harris*, 632 F.2d 296 (4th Cir. 1980). See also Federal Administrative Judiciary, *supra* note 4, at 899-901, 904-906.

<sup>23</sup>See, e.g., *Beck v. Mathews*, 601 F.2d 376 (9th Cir. 1979); *Holland Furnace Co. v. FTC*, 295 F.2d 302 (7th Cir. 1961); *NLRB v. International Brotherhood of Electrical Workers*, 432 F.2d 965 (8th Cir. 1970).

<sup>24</sup>Examples of this necessary zeal in developing a complete record may be found in the opinions of Judge Seymour Wenner in *The Permian Basin Rate Case*, 34 FPC 159 (September 17, 1964), and Judge Stephen Gross in the *Continental-Western Merger Case*, CAB 967, Docket 33465 (served April 16, 1979), in calling their own witnesses when they found the record inadequate. For examples of cases recognizing a hearing officer's authority, zeal or no zeal, to protect and develop the record in a fair manner, see also, e.g., *Poulin v. Bowen*, 817 F.2d 865 (D.C. Cir. 1987); *Fernandez v. Schweiker*, 650 F.2d 5 (2d Cir. 1981); *Busey v. St. Hilaire*, 1990 NTSB Lexis 20, Order EA-3073, Docket SE-8606 (1990) (recognizing that law judges may address, *sua sponte*, relevant matters which the parties may have overlooked, or deliberately ignored).

<sup>25</sup>Form 8-a in Appendix I is a sample order directing the parties to research a question of law.

<sup>26</sup>See *Marsh v. Harris*, 632 F.2d 296 (4th Cir. 1980). See *Iran Air v. Kugelman*, for a discussion of the relationship between the role of the ALJ and the role of the agency head. 996 F.2d 1253 (D.C. Cir. 1993).

<sup>27</sup>However, §556(c) is not limited expressly to administrative law judges. By its own terms, §556(c) extends to "employees presiding at hearings," which are subject to §556 of the APA.

§556(c) itself, an administrative law judge may: (1) administer oaths and affirmations; (2) issue subpoenas authorized by law; (3) rule on offers of proof and receive relevant evidence; (4) take depositions or have depositions taken when the ends of justice would be served; (5) regulate the course of the hearing; (6) hold conferences for the settlement or simplification of the issues by the consent of the parties, or by the use of *alternative means of dispute resolution as provided in subchapter IV of this chapter*; (7) inform the parties about the availability of one or more *alternative means of dispute resolution*, and *encourage use of such methods*; (8) require the *attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy*; (9) dispose of procedural requests or similar matters; (10) make or recommend decisions in accordance with section 557 of the APA; and (11) take other action authorized by agency rule consistent with the APA.

Two important points should be emphasized with respect to this list. First, the administrative law judge obviously is in many ways the functional equivalent of a trial judge in federal or state court. Receiving relevant evidence, ruling on offers of proof, holding conferences, disposing of procedural matters, and regulating the course of hearings obviously involve the very essence of the judicial function. (Equally obvious, many of the functions enumerated in §556(c) require administrative law judges to exercise judicial-type discretion and judgment.)

Second, the italicized passages in the list above emphasize a less obvious, but important, aspect of the administrative law judge's role. Recent changes in federal law,<sup>28</sup> and §556(c) in particular,<sup>29</sup> remove any doubt that administrative law judges can be authorized to go beyond a narrow or rigid version of the judicial role. In a phrase, the changes involve "alternative dispute resolution," a topic which warrants separate treatment in this Manual.

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<sup>28</sup>Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (with changes to section numbering in Title 5 made by the Administrative Procedure Technical Amendments Act, Pub. L. No. 102-354, 106 Stat. 944 (1992)) (codified mainly at 5 U.S.C. §§571-83, with codification of miscellaneous provisions in various sections of titles 9, 28, 29, and 41).

<sup>29</sup>5 U.S.C. §556(c) was amended by §4 of the Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736, 2737 (1990).

## C. Alternative Dispute Resolution and Administrative Law

### 1. General Background

One of the most significant legal developments during the past two decades has been a strong movement toward using alternatives to formal adjudication in the resolution of disputes. A term frequently employed to describe this movement is "alternative dispute resolution" (ADR or dispute resolution). The term itself, ADR, actually is a short-hand label that covers a lot of territory. It denotes an open-ended, evolving set of techniques and concepts. It is an "inclusive"<sup>30</sup> and elastic term, which embraces not only established concepts such as negotiation, arbitration, and mediation, but also a growing variety of innovations and hybrids.<sup>31</sup> As the words themselves imply, perhaps the most important common denominator linking various ADR techniques is their nature as *alternatives*--alternatives to formal litigation as a means of resolving disputes.

The term "ADR" thus eludes precise definition. A wide assortment of procedural devices--some of which have not yet been invented--could fairly be classified as ADR. As a concept, ADR is still evolving. The main qualification for being classified as ADR seems to be that the technique or process offers a substitute for formal adjudication.

Despite the open-ended quality of ADR as a concept, ADR still is susceptible to classification and organizing principles of one kind or another. One of the typical ways of classifying ADR techniques is to conceive of them in terms of a spectrum or continuum of methods, arranged according to the degree of control remaining in the hands of the parties.<sup>32</sup> At one end of the spectrum are procedures where the parties retain virtually complete control, with no input from neutrals or nonparties. Here, we would find the very traditional concept of voluntary, unstructured *negotiation* between (or among) the parties. At the other end of the spectrum are procedures where the parties surrender control over resolution of the dispute to some third party. There, we would find another traditional concept, binding *arbitration*. With binding arbitration, the result of the arbitrator's decision is indistinguishable, as a practical matter, from adjudication by a court. Between the extremes is a wide range of techniques and devices which, for the most part, share one feature--

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<sup>30</sup>Administrative Conference, *The Administrative Dispute Resolution Act: Guidance for Agency Dispute Resolution Specialists* 3 (1992) (hereinafter, *Guidance for Agency Dispute Resolution Specialists*).

<sup>31</sup>See L. Ray, *Emerging Options in Dispute Resolution*, 75 A.B.A. J. 66 (June 1989).

<sup>32</sup>*Id.* at 67, and *Guidance for Agency Dispute Resolution Specialists*, *supra* note 30, at 4-7.

the intervention of some third party who plays variations on the theme of *mediation*.

## 2. Relevance of ADR to Administrative Law Judges

Even without the Administrative Dispute Resolution Act,<sup>33</sup> ADR would be a topic of considerable significance to administrative law judges. If nothing else, familiarity with ADR techniques and concepts can help avoid time-consuming litigation by enhancing the judge's ability to foster negotiations and settlements between parties. Many ADR approaches are quite adaptable and fully consistent with agency rules and the organic acts governing particular agencies. Certainly, almost all agencies have a policy of favoring appropriate settlements as an alternative to formal adjudications.

A judge therefore may be able to borrow ideas from ADR, adapt them to pending cases, and encourage resolution of disputed matters without formal adjudication. In a sense, ADR is not just an important and evolving assortment of techniques for avoiding formal litigation. It is a state of mind--a willingness to entertain alternatives and to reexamine assumptions about formal litigation.

In any event, ADR has become a part of administrative law and a fact of life for administrative law judges. However, before discussing the extension of ADR into administrative law, it is advisable to discuss some ADR techniques and devices. Although the following list is far from complete, and does not purport to be exhaustive, it summarizes a number of ADR techniques and devices which should be relevant to judges.

(1) *Informal, unstructured settlement negotiations.*<sup>34</sup> Negotiated agreements always have been, and probably always will be, an alternative to formal adjudication. No citation is needed to support the fact that most cases (upwards of 90% or more) are settled without going to trial.

(2) *Structured case management devices.*<sup>35</sup> Although not commonly included in ADR taxonomies, and although an extremely broad concept, structured case management devices can be used as ADR tools. Within the concept of structured case management are such devices as court or agency rules which systematically regulate the parties' pretrial preparation. As one study has indicated, negotiations and settlements can be facilitated (and formal litigation therefore avoided) if the parties are forced, by rule or judge's order, to evaluate their own cases.

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<sup>33</sup>See text *supra* accompanying note 28, and *infra* accompanying notes 70-80.

<sup>34</sup>Ray, *supra* note 31, at 67.

<sup>35</sup>*Cf.* Administrative Conference, Recommendation 86-7, Case Management as a Tool for Improving Agency Adjudication, 1 CFR §305.86-7 (1992).

[S]ome lawyers. . . seem to find it difficult to squarely face their own situations early in the life of a lawsuit. Sometimes counsel have difficulty developing at the outset a coherent theory of their own case. . . . Sometimes [they] are so pressed by other responsibilities that they. . . systematically analyze their own cause only when some external event forces them to do so.<sup>36</sup>

As one example of ways to force parties to analyze their cases early on, rules governing pleadings might require the parties to be specific about the factual bases of the allegations contained in the complaint and answer. The parties, or at least their lawyers, would then need to examine the case more closely, instead of making broad, general assertions in their pleadings, which could cover almost any conceivable state of facts. In other words, an agency might impose a kind of hybrid fact-pleading on the parties.<sup>37</sup> Or, by rule or a judge's order, parties may be required to file a report with the judge summarizing their settlement efforts. These types of techniques differ from various types of *mediation* because no judge or third party has *personally* intervened in an effort to mediate directly between the parties. The rules or orders themselves impel the parties to focus on their cases, and may even force the parties to begin negotiating because they must report to the judge.

(3) *Mediation*. Mediation generically is the use of a neutral to help the parties reconcile their differences.<sup>38</sup> Put colloquially, the mediator is a neutral go-between, ideally the proverbial "honest broker." The classic mediator has no power at all to impose an outcome or render a decision. In fact, one Code of Professional Conduct for Mediators expressly states: "It is the mediator's responsibility to assist the disputants in reaching a settlement. At no time should a mediator coerce a party into agreement."<sup>39</sup> Nor is the mediator

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<sup>36</sup>Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986) (emphasis added).

<sup>37</sup>Mullins, *Alternative Dispute Resolution and the Occupational Safety and Health Review Commission*, 5 ADMIN. L. J. 555, 568-69 (1991).

<sup>38</sup>Guidance for Agency Dispute Resolution Specialists, *supra* note 30 at 5, and Ray, *supra* note 31, at 67; Administrative Conference of the United States, Recommendation 86-3, "Agencies' Use of Alternative Means of Dispute Resolution," 1 CFR §305.86-3 (1992) (at Appendix--Lexicon of Alternative Means of Dispute Resolution) [hereinafter, Agencies' Use of Alternative Means of Dispute Resolution], *reprinted* in Administrative Conference, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION 113, 117-8 (1987) [hereinafter ADR Sourcebook].

<sup>39</sup>Code of Professional Conduct developed by the Center for Dispute Resolution, Denver, Colorado, #1, *reprinted* in Goldberg, Green & Sander, Dispute Resolution 117 (1985) (emphasis added).

ordinarily bound to follow any set procedures, rules of evidence, agenda, or approach. Indeed, an important advantage of mediation is its inherent flexibility of form and approach. Unless there are constraints to the contrary, a mediator can meet with all parties together, or separately, or at some times together and at other times separately. Techniques and tactics can vary.<sup>40</sup> The mediator in one dispute may engage in the equivalent of shuttle diplomacy, going back and forth between the parties, communicating offers and counteroffers *and* the mediator's own views. In another dispute, the same mediator may insist that all parties sit down together with the mediator and engage in some genuine communication with each other. Whatever the procedures and tactics may be, the mediator's goal is to help the parties reach an agreement acceptable to all of them.

(4) *Conciliation*. The distinctions between conciliation and mediation may be fuzzy, but at least one lexicon of ADR terminology implies that there is a difference in degree between the two concepts. The word "conciliation" is used to refer to situations where the neutral must reduce tensions and improve communication among the parties "in volatile conflicts where the parties are unable, unwilling, or unprepared to come to the table to negotiate their differences."<sup>41</sup>

(5) *Facilitating*. Another first cousin to mediation, facilitating (or facilitation) seems to refer to neutrals who intervene procedurally (e.g., to conduct meetings and coordinate discussions), but who avoid becoming involved in resolving disputed substantive issues. In other words, a facilitator concentrates on promoting negotiation and settlement by using procedural devices to bring the parties together, but does not intervene actively in the substance of the parties' positions or negotiations.<sup>42</sup>

(6) *Neutral evaluation, or early neutral evaluation*. This process, often employed early in the course of a dispute, generally entails a neutral factfinder, possessed of substantive expertise if needed, who evaluates the merits of the parties' cases. The evaluation, often in writing, is nonbinding, but it gives the parties an idea of how an objective decisionmaker might perceive the strengths and weaknesses of their respective positions. Several courts and the Departmental Appeals Board of the U.S. Department of Health and Human

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<sup>40</sup>See generally Maggiolo, *TECHNIQUES OF MEDIATION* (Oceana, 1985).

<sup>41</sup>Ad Hoc Panel on Dispute Resolution and Public Policy, National Institute for Dispute Resolution, *Paths to Justice: Major Public Policy Issues of Dispute Resolution* 36-37 (1983), reprinted in ADR Sourcebook, *supra* note 38, at 44-45.

<sup>42</sup>See Agencies' Use of Alternative Dispute Resolution, *supra* note 38, in Appendix; *Paths to Justice*, *supra* note 41, at 37, reprint at 45.

Services have established early neutral evaluation programs of one sort or another.<sup>43</sup>

(7) *Factfinding*. This process involves a neutral or a panel of neutrals, typically with relevant technical expertise, who make advisory findings of facts on disputed matters. Factfinding often involves informal presentation by each party of its case to the factfinder(s). After the factfinder(s) render their findings, the parties can continue to negotiate.<sup>44</sup> As one textbook on dispute resolution has noted, factfinding by neutral experts has the potential to become particularly important in cases where the disputes orbit around complex technological, scientific, or other data from specialized fields.<sup>45</sup> Rule 706 of the Federal Rules of Evidence already allows a federal court to appoint expert witnesses on its own motion or on the motion of a party.<sup>46</sup>

(8) *Settlement Judge*. The settlement judge is a fairly recent hybrid of special interest to administrative law judges. The settlement judge basically is a mediator or neutral evaluator.<sup>47</sup> What distinguishes the settlement judge from other types of mediators and neutrals is the fact that the settlement judge is typically an administrative law judge from the agency which is adjudicating the dispute.<sup>48</sup> The settlement judge, simply put, is (usually) an agency administrative law judge who is specially assigned to undertake mediation-type efforts in an appropriate case, but who is not assigned to decide that case. The settlement judge has been described as "an ingenious device,"<sup>49</sup> because it preserves the very real advantages of having a judge actively involved in the settlement process, while simultaneously avoiding the problems that could arise if the judge who is to decide the case becomes *too* actively involved in settlement negotiations.<sup>50</sup> Among other things, an agency administrative law judge appointed to serve as a settlement judge: (1) is free of constraints such as the APA's prohibitions on *ex parte* contacts;<sup>51</sup> (2) brings to the negotiation process authority that stems from being a judge; (3) has a familiarity with the

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<sup>43</sup>See Guidance for Agency Dispute Resolution Experts, *supra* note 30 at 6, and Brazil, Kahn, Newman, & Gold, *supra* note 36.

<sup>44</sup>See Guidance for Agency Dispute Resolution Specialists, *supra* note 30, at 6; Agencies' Use of Alternative Dispute Resolution, *supra* note 38, in Appendix.

<sup>45</sup>Goldberg, Green, & Sander, *supra* note 39, at 293-98.

<sup>46</sup>Federal Rules of Evidence, Rule 706 (a).

<sup>47</sup>Guidance for Agency Dispute Resolution Specialists, *supra* note 36, at 6-7.

<sup>48</sup>*Id.* See also Administrative Conference, Recommendation 88-5, "Agency Use of Settlement Judges," 1 CFR §305.88-5 (1992).

<sup>49</sup>Joseph & Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 3 ADMIN. L. J. 571, 573 (1989-90).

<sup>50</sup>See Mullins, *supra* note 37, at 560.

<sup>51</sup>5 U.S.C §§554(d), 557(d)(1988). See also Joseph & Gilbert, *supra* note 49, at 582-84.

subject-matter that is born of experience in presiding over the agency's cases; and (4) has the flexibility of a mediator as to the tactics and strategies that can be employed.<sup>52</sup> Among the agencies already using settlement judges are the Department of Housing and Urban Development (HUD), the Department of Labor (DOL), the Federal Energy Regulatory Commission (FERC), the Occupational Safety and Health Review Commission (OSHRC), and the Federal Communications Commission (FCC).<sup>53</sup>

(9) *Minitrial*. The word "minitrial" is somewhat misleading. A minitrial does involve presentations by each party in a hearing-type setting. However, the presentations are given before senior officials, *of each party*, who are authorized to settle the case. Thus, a minitrial actually is a structured settlement process. Each side, after agreeing on details of the procedure, presents a highly abbreviated version of its case to the senior officials, who are sometimes aided by a neutral. These senior officials, authorized to settle the dispute, can see for themselves how their case and that of the other party (or parties) could be perceived at a full-fledged trial, thus providing a basis for more realistic negotiations.<sup>54</sup> Agencies that have used minitrials include the Army Corps of Engineers (contract and environmental disputes), NASA; the Department of the Interior; the Department of Energy, and FERC.<sup>55</sup>

(10) *Conference*. Although omitted from some lists of ADR techniques, the good old-fashioned prehearing or other conference, presided over by a judge (or other hearing official), has substantial ADR potential and should not be ignored. Unless there are some very good reasons to the contrary, a judge holding a conference with the parties should, almost as a matter of routine, explore the possibilities for settlement. The APA expressly authorizes conferences for the settlement or simplification of issues,<sup>56</sup> and agency procedural rules typically contain virtual boiler-plate language authorizing judges and other hearing officers to hold "conferences for the settlement or

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<sup>52</sup>See Joseph & Gilbert, *supra* note 49, at 585-86; Mullins, *supra* note 37, at 560-61, 591-99.

<sup>53</sup>18 CFR §385.603 (1991) (FERC); 24 CFR §104.620 (1991) (HUD); 29 CFR Part 18 (1993); 29 CFR §2200.101 (1991) (Occupational Safety and Health Review Commission); 47 CFR §1.244 (1991) (FCC); 48 CFR §6302.30 (1991) (DOT Board of Contract Appeals). See also General Order No. 13, U.S. U.S. Court of Federal Claims (April 15, 1987).

<sup>54</sup>See *e.g.*, Agencies' Use of Alternative Dispute Resolution, *supra* note 44, in Appendix--Lexicon of Alternative Means of Dispute Resolution; Guidance for Agency Dispute Resolution Specialists, *supra* note 36, at 7; Ray, *supra* note 37, at 68; Goldberg, Green & Sander, *supra* note 39, at 271-78.

<sup>55</sup>Guidance for Agency Dispute Resolution Specialists, *supra* note 30, at 7.

<sup>56</sup>5 U.S.C. §556(c)(1988 & pocket part).

simplification of issues."<sup>57</sup> Moreover, several agencies have regulations explicitly providing, in various contexts, for settlement conferences.<sup>58</sup>

(11) *Arbitration*. In terms of its practical effect, arbitration is only a step or so removed from adjudication. The arbitrator, like a judge, is a neutral (supposedly) who is authorized to resolve a dispute between or among parties. Generally, the parties will make some kind of presentation to the arbitrator, in the equivalent of a hearing. (Also, there may be a panel of arbitrators, rather than a single arbitrator.) However, the arbitrator is not necessarily required to follow the law books, either substantively or procedurally. The parties themselves may select the arbitrator, agree on the procedures to be followed, and even determine the criteria for the arbitrator's decision--although much depends on the kind of arbitration being conducted. For example, at one extreme, the original negotiation of a commercial transaction between two parties may result in contractual provisions under which the parties agree to submit all (or certain) disputes arising under the contract.<sup>59</sup> At the other extreme, but quite rarely, one may find examples of mandatory arbitration being imposed by law on the parties.<sup>60</sup> In between, there are any number of possible variations on the theme of arbitration, but one key variable is whether the arbitration will result in a binding decision or have merely an advisory effect.<sup>61</sup>

### 3. Confidentiality

There is one crucial aspect to mediation, variations on mediation, and ADR in general that must be emphasized, even in a summary treatment of the subject--confidentiality. Mediators and other ADR neutrals often communicate *ex parte* and obtain information on a confidential basis. The neutral or

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<sup>57</sup>See, e.g., 13 CFR §134.18 (1991)(Small Business Administration, Office of Hearings and Appeals); 16 CFR §3.42 (1991)(Federal Trade Commission, Rules of Practice for Adjudicative Proceedings); 29 CFR §417.6 (Procedures for Removal of Local Labor Organization Officers, Powers of Administrative Law Judge); 49 CFR §386.54 (1991)(Rules of Practice for Motor Carrier Safety and Hazardous Materials Proceedings; Administrative Law Judge).

<sup>58</sup>For example, 12 CFR §509.20(b) (1991)(Office of Thrift Supervision, Opportunity for Informal Settlement); 14 CFR §1264.117(b)(3) (1991)(NASA, Implementation of the Program Fraud Civil Penalties Act of 1986, Authority of the presiding officer); 18 CFR §157.205 (1991)(FERC, Interstate Pipeline Blanket Certificates, Notice Procedure).

<sup>59</sup>Goldberg, Green & Sander, *supra* note 39, at 190.

<sup>60</sup>See 7 U.S.C. §136a(c)(1)(D)(ii) (1988)(regarding arbitration to determine compensation for use of data); 29 U.S.C. §1401 (1988)(arbitrating amount of liability for withdrawal from certain kinds of pension plans).

<sup>61</sup>See Ray, *supra* note 31, at 67. The ADR Act authorizes binding arbitration in disputes involving federal agencies, but places certain limitations on its use. 5 U.S.C. §§575-581.

mediator may be told, in confidence, that a party's bargaining position is substantially different from what the party regards as an acceptable compromise. Without the possibility for confidentiality, the effectiveness of neutrals in ADR would be seriously jeopardized. The Administrative Conference has summarized this need for confidentiality in a way that hardly can be improved upon:

Most ADR techniques, including mediation, nonbinding arbitration, factfinding and minitrials, involve a neutral third party who aids the parties in reaching agreement. . . . A skillful mediator can speed negotiations and increase chances for agreement by holding separate confidential meetings with the parties, where each party may give the mediator a relatively full and candid account of its own interests (rather than its litigating position), discuss what it is willing to accept, and consider alternative approaches. The mediator, armed with this information but avoiding premature disclosure of its details, can then help to shape the negotiations in such a way that they will proceed most directly to their goal. The mediator may also carry messages between the parties, launch 'trial balloons,' and act as an agent of reality to reduce the likelihood of miscalculation. This structure can make it safe for the parties to talk candidly and to raise sensitive issues and creative ideas. . . .

With all of these neutrals, many of the benefits of ADR can be achieved only if the proceedings are held confidential. Confidentiality assures the parties that what is said in the discussions will be limited to the negotiations alone so they can be free to be forthcoming. This need extends to the neutral's materials, such as notes and reports, which are produced solely to assist the neutral in the negotiation process and which others could misconstrue as indicating a bias against some party or interest. This is why many mediators routinely destroy their personal notes and drafts and return all other materials to the parties.<sup>62</sup>

Much mediation would be futile if information imparted in confidence to a mediator could be routinely disclosed. However, absolute confidentiality

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<sup>62</sup>Administrative Conference, Recommendation 88-11, "Encouraging Settlements by Protecting Mediator Confidentiality," 1 CFR §305.88-11 (1992) (emphasis added) [hereinafter Protecting Mediator Confidentiality].

cannot be guaranteed, and there are situations where disclosure could be required. Of particular significance to federal agencies and judges are certain provisions of the Administrative Dispute Resolution Act.<sup>63</sup> These provisions prohibit disclosure of information communicated in confidence during dispute resolution procedures, unless one or more of the following conditions exist:

- all participants involved in the communication agree in writing
- the communication has already been made public
- the communication is required by statute to be made public
- a court determines that disclosure or testimony is necessary to: (1) prevent a manifest injustice; (2) help establish a violation of the law; (3) prevent harm to the public health or safety. (The "harm" or "injustice" must be of sufficient magnitude in the particular case to outweigh the impact on the integrity of dispute resolution proceedings in general because of reduced confidence of parties in future cases that their communications will remain confidential.)
- a party to a confidential communication made during dispute resolution procedures also may disclose a communication if: (1) the communication was prepared by the party seeking disclosure; (2) the communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or (3) the communication was provided to or was available to all parties to the dispute resolution proceeding.

It is especially important, in this Manual for Administrative Law Judges, to emphasize the confidentiality aspects of much ADR. A judge accustomed to presiding over formal evidentiary hearings is likely to have developed a strong mindset favoring placing everything on the record and avoiding even the appearance of secretive dealings. For formal adjudications this is highly appropriate. However, if appointed to serve as a settlement judge or as some

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<sup>63</sup>See, e.g., 5 U.S.C. §574 formerly §584, but renumbered as 5 U.S.C. §574, pursuant to the Administrative Procedure Technical Correction Act, Pub. L. No. 102-354, 106 Stat. 944 (August 26, 1992). See generally Administrative Conference, *MEDIATION: A PRIMER FOR FEDERAL AGENCIES* (1993).

other kind of mediator, the judge must adapt--sometimes quickly--to the need for confidential, even *ex parte*, communications.

#### 4. The Extension of ADR into Administrative Law

Although impetus for the ADR movement originally stemmed from discontent with the judicial system,<sup>64</sup> extension of ADR into administrative law was both predictable and natural. For one thing, agency adjudications involving the right to a full evidentiary hearing are all but indistinguishable, functionally, from full evidentiary hearings before a state or federal court.<sup>65</sup> For another, such formal agency adjudications far outnumber the federal court caseload.<sup>66</sup> Quantitatively and qualitatively the net result has been considerable "judicialization" of our administrative law system.<sup>67</sup> As ADR gained momentum in state and federal court systems, it was almost inevitable that ADR would be transplanted into the federal agencies.

The extension of ADR to administrative law during the past 10 years or so can be summarized with three key words: experimentation, implementation, and legislation. During the 1980s various federal agencies experimented with ADR techniques and procedures. For example, one early development was the application of ADR to government contracting disputes.<sup>68</sup> Other agencies and kinds of agency actions followed suit, experimenting and implementing.<sup>69</sup> Then, in 1990, came the legislation.

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<sup>64</sup>See Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Ray, *supra* note 31; Riggs & Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L. J. 125, 126 (1987); Sander, *The Variety of Dispute Resolution*, 70 F.R.D. 111 (1976).

<sup>65</sup>See, e.g., the APA's provisions for formal adjudications: §§554, 556, 557 (1988).

<sup>66</sup>See, e.g., Schwartz, *ADMINISTRATIVE LAW: A CASEBOOK* 43, 45-46 (3d ed. 1988).

<sup>67</sup>Harter, *Dispute Resolution and Administrative Law*, 29 VIII L. REV. 1393, 1403, n. 46 (1983-84). See generally *Agencies' Use of Alternative Means of Dispute Resolution*, *supra* note 38.

<sup>68</sup>Crowell & Pou, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 1987 ACUS 1139; Crowell & Pou, *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183 (1990).

<sup>69</sup>E.g., Edelman, Carr, & Simon, *ADR at the U.S. Army Corps of Engineers*, Pou, *Federal Agency Use of ADR: The Experience to Date*, and Robinson, *ADR in Enforcement Actions at the U.S. Environmental Protection Agency*, in *CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT* (Fein, ed. 1987); *A Colloquium on Improving Dispute Resolution: Options for the Federal Government*, 1 ADMIN. L. REV. 399 (1987) (entire issue devoted to this colloquium); Mullins, *supra* note 37, at 558-59.

In a sense, the Administrative Dispute Resolution Act (ADR Act)<sup>70</sup> is a culmination of earlier experimentation and implementation, and a further experiment.<sup>71</sup> The ADR Act, among other things, requires each federal agency to: (1) review its programs and adopt policies addressing the use of ADR;<sup>72</sup> and (2) designate a senior official as the agency's dispute resolution specialist, to be responsible for implementing the ADR Act and relevant agency policies.<sup>73</sup> The ADR Act also removes any doubt concerning a federal agency's authority to use ADR where the parties agree.<sup>74</sup> It also authorizes administrative law judges to use or encourage the use of ADR and to require at settlement conferences the attendance of parties' representatives who are authorized to negotiate concerning disputed issues.<sup>75</sup> The ADR Act also adds a new subchapter to Chapter 5 of title 5 of the U.S. Code entitled "ALTERNATIVE MEANS OF DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCESS."<sup>76</sup> Among other things, this new subchapter: (1) provides criteria for an agency's use in evaluating the appropriateness of ADR;<sup>77</sup> (2) states that ADR procedures authorized under the ADR Act are voluntary and supplemental;<sup>78</sup> (3) goes into considerable detail regarding confidentiality and communications which are made during the course of ADR processes;<sup>79</sup> and (4) contains, again in considerable detail, provisions authorizing and governing agency arbitration procedures.<sup>80</sup>

For the foreseeable future, administrative law judges and other agency hearing officers will encounter more--not less--emphasis on ADR. Familiarity with ADR, as a concept and a process, is likely to become as much a part of

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<sup>70</sup>To convey a somewhat more precise picture of the scope of this Act, it should be noted that the provisions adding to or amending the U.S. Code will be found at 5 U.S.C. §§571-83 (general provisions, definitions, confidentiality, arbitration); 5 U.S.C. §556(c) (ALJ authority); 9 U.S.C. §10 (arbitration, judicial review); 41 U.S.C. §§604-607 (contract disputes); 29 U.S.C. §173 (Federal Mediation & Conciliation Service authority); 28 U.S.C. §2672 (tort claims); and 31 U.S.C. §3711(a)(2) (government claims). Pub. L. No. 101-552, 104 Stat. 2736, as amended by Administrative Procedure Technical Amendments Act of 1991, Pub. L. No. 102-304, 106 Stat. 944 (1992).

<sup>71</sup>A sunset provision terminates the ADR Act, with exceptions for pending proceedings, on October 1, 1995. Pub. L. No. 101-552, §11, 104 Stat. 2747-48 (1990).

<sup>72</sup>Pub. L. No. 102-552, §3(a).

<sup>73</sup>*Id.* at §3(b).

<sup>74</sup>*Id.* at §4.

<sup>75</sup>*Id.* at §4(a), codified at 5 U.S.C. §556(c).

<sup>76</sup>*Id.* at §4(b).

<sup>77</sup>5 U.S.C. §572(b).

<sup>78</sup>5 U.S.C. §572(c).

<sup>79</sup>5 U.S.C. §574.

<sup>80</sup>5 U.S.C. §§575-581.

the competent administrative law judge's professional qualifications as the ability to write a decision or substantive knowledge of the applicable law.

## II. Prehearing Conferences & Settlements

As soon as a case is assigned, the judge should thoroughly study the pleadings (and other filings) in order to assess the need for a prehearing conference and the possibilities for settlement. Not every case will require a full-blown conference, with all of the features described later in this chapter. The issues may be relatively simple, the substantive law or regulations fairly specific, and the facts subject to only a limited range of disagreement. In many kinds of proceedings, the typical case may need only a simple telephone conference call with the parties<sup>81</sup> and a brief conference report summarizing the matters that were agreed upon. Sometimes, the objectives served by a prehearing conference can be achieved by correspondence between the judge and the parties,<sup>82</sup> or by the judge directing the parties to correspond or confer by telephone with each other.<sup>83</sup> After all, the prehearing conference is a tool--a means to an end, not an end in itself. Prehearing conferences are primarily a way to organize the proceedings to achieve optimum productivity and avoid wasting time and effort. An effective prehearing conference can be useful in identifying areas of disagreement (and agreement), setting a schedule or agenda for any pretrial discovery, and taking other steps to lay the groundwork for either: (a) settlement, or (2) an efficient, orderly, and fair hearing. Moreover, a prehearing conference usually is not limited to any set form or time. Parties, agencies and judges can hold conferences of various types, for various purposes, at different times during a case.

The main point is: whatever form it may take, there should be prehearing assessment and preparation that is adequate and appropriate to the case.

Adequacy and appropriateness, however, are not always a simple matter. Formal administrative proceedings vary so much in complexity, type and number of issues, length of hearing, or other factors, that special prehearing procedures may be necessary. The judge may have to devise individually tailored procedures to ensure that all parties will receive an equitable and expeditious decision. (This may help explain why there seems to be at least

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<sup>81</sup>An interesting booklet, which contains not only valuable suggestions, but also a page of additional information sources, is: American Bar Association (Action Commission to Reduce Court Costs and Delay), *Telephone-Conferenced Court Hearings: A How-To Guide for Judges, Attorneys, and Clerks* (1983).

<sup>82</sup>See 15 CFR §788.12(b) (1991)(Department of Commerce, Bureau of Export Administration).

<sup>83</sup>19 CFR §354.11(b)(1991)(Department of Commerce, International Trade Administration).

one common thread running through the mind-staggering number and variety of agency procedural regulations dealing with [or mentioning] prehearing conferences<sup>84</sup> and procedures. Most of them give considerable discretion, one way or another, to the judge or presiding officer.<sup>85</sup>)

Sometimes, the issues and facts are so complex or the number or identity of the parties so uncertain that several preliminary steps are necessary before evidence even can be obtained. In such situations, the need for a fairly elaborate and carefully prepared prehearing conference is obvious. Furthermore, in such cases exhibits and other direct evidence often cannot be prepared until discovery produces the necessary information or data.<sup>86</sup> Several prehearing conferences ultimately may be needed. The judge must adapt procedures to each individual case.

Because a prehearing conference is one of the most practical and efficient methods of starting a complex, formal proceeding, a detailed discussion of conferences in such cases follows. It should be emphasized, however, many of the tactics, techniques, and concepts described below can be used, or adapted for use, in any type of case. Although many cases will not require all of the steps and tactics described below, efficient management of any proceeding can be enhanced by familiarity with them. Also, it goes without saying that the judge always should be alert before, during, and after any conferences--and at all times--to the possibility of aiding the parties to settle the case and to the use of other alternatives to full-scale litigation. However, rather than belabor these points throughout the following discussion of prehearing conference procedures, the topics of settlement and alternative dispute resolution will be accorded a separate section in their own right, at the end of this chapter.

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<sup>84</sup>In response to a search request on the Lexis CFR database, during March 1992, for the term "prehearing conference," Lexis reported 419 "sections."

<sup>85</sup>For example, the Department of Agriculture's rules of practice governing formal adjudicatory proceedings under various statutes empower the judge, upon motion of any party or on the judge's own motion, to "direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing," if the judge finds the proceeding would be expedited by a conference. The rule also refers, in open-ended fashion, to "Such other matters as may expedite and aid in the disposition of the proceeding." 7 CFR §1.140(a)(1991). For another example, see 10 CFR §1013.19(a) (1991)(Department of Energy, Program Fraud Civil Remedies and Procedures: "The ALJ may schedule prehearing conferences as appropriate.").

<sup>86</sup>For a rule which contemplates a prehearing conference even before discovery, see 10 CFR §2.740 (1991)(Nuclear Regulatory Commission, proceeding on application for construction permit or operating license for a production or utilization facility).

## A. Preparation for Prehearing Conference, With Emphasis on Complex, Multiparty Proceedings

Although a conference serves many purposes, it is almost indispensable as a means of organizing a complex, formal, multiparty administrative proceeding. A conference in such cases permits joint consideration of various procedural matters, such as the need for exchange of information and evidence before the hearing, arrangements for stipulations, and the time and place of hearing. A well-run conference, requiring only a day or two (compared to days or weeks of hearing) will usually ease all succeeding steps. However, preparation for the conference is necessary.

The judge who sets a prehearing conference and goes into it ignorant of the pleadings and with no effort to obtain at least some basic information about the case is asking for serious trouble--and wasted time. Nor should the judge allow the parties to come to the conference unprepared. A prehearing conference should not be the participants' introduction to a case. To the contrary, all interested persons should prepare for it in advance. The conference can be crucial in shaping the course of the later proceedings. It should serve as the first opportunity to clarify, isolate, and dispose of the problems involved.

Fortunately, the judge need not, and *should not*, conduct a personal investigation in order to obtain more information about the case. Usually there is available at least one important device which can provide information and, at the same time, impel the parties to prepare for the conference. The judge may direct interested persons to submit to him and to all known parties proposed statements of issues, proposed stipulations, requests for information, statements of position, proposed procedural dates, and other informational material.<sup>87</sup> This direction may appear in the prehearing conference notice or in a supplemental letter.

## B. Notice

In many agencies the judge establishes the date and issues the prehearing conference notice.<sup>88</sup> For complex, multiparty cases, however, there may be some problems. For instance, there may be questions concerning who is, or

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<sup>87</sup>See, e.g., 7 CFR §1.140 (1991)(Department of Agriculture); 15 CFR §788.12 (1992)(Department of Commerce, Bureau of Export Administration); 17 CFR §201.8(d)(1991)(Securities & Exchange Commission); 43 CFR §§4.824, 4.833 (1991)(Department of the Interior).

<sup>88</sup>Forms 1-a and 1-b in Appendix I are sample notices of a prehearing conference.

can be, a party.<sup>89</sup> Therefore, regardless of minimum legal requirements for notice, such as publication in the Federal Register, the public may be best served in a complex, potentially multiparty case, if *actual* notice is given to all those with an apparent interest. If particular individuals or associations, few in number, are directly affected, they could be notified directly. If a specific geographic area is involved, it may be appropriate to notify local governmental authorities and civic groups individually. If many persons or groups may be interested, or if the identity of interested persons is not known, news media, including trade journals, might be used. Frequently, trade or professional associations will notify their members through regular or special circulations. The judge should use ingenuity to devise ways to notify all interested persons.

### C. Conference Transcript

Some judges believe that transcribing a conference inhibits frank exchange. Whether or not this is so, it is an expense that may be avoided if the judge simply records agreements and rulings in notes or by dictation to a secretary or into a recorder.<sup>90</sup> Since the judge ordinarily will provide to the parties a report summarizing the outcome of the conference,<sup>91</sup> the need for a verbatim transcript may be marginal.

In complex cases, however, any inhibiting effect is usually outweighed by the need to prevent any later dispute about the conference conditions, rulings, and agreements, and it is better to have a verbatim transcript. Some agencies require an official transcript of prehearing conferences.<sup>92</sup>

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<sup>89</sup>See *Office of Communication v. FCC*, 359 F.2d 994 (D.C. Cir. 1966)(intervention as party in license renewal proceedings for commercial television broadcaster).

<sup>90</sup>For examples of agency regulations which indicate that the judge has discretion on whether a transcription of a prehearing conference is to be made, see 7 CFR §1.140(b) (1991)(Department of Agriculture prehearing conference will not be stenographically reported unless so directed by the judge); 12 CFR §19.30 (1991)(Comptroller of Currency, "unless the conference has been recorded and transcribed"); 15 CFR §788.12 (1991) (Department of Commerce, Bureau of Export Administration: administrative law judge may order the conference to be recorded electronically or taken by a reporter); 40 CFR §85.1807(1991) (Environmental Protection Agency: results of conference, if not transcribed, shall be summarized in writing); 42 CFR 498.50 (1991) (Health & Human Services, Health Care Financing Administration; record of prehearing conference may be transcribed at the request of either party or the ALJ). *But see* 24 CFR §26.21 (1991)(Department of Housing and Development; prehearing conference, at request of party, *shall* be recorded or transcribed)(emphasis added).

<sup>91</sup>See *infra*, text at note 99.

<sup>92</sup>See, e.g., 10 CFR §2.1021 (1991) (Nuclear Regulatory Commission); 47 CFR §1.248(e) (1991) (Federal Communications Commission).

If funds for a verbatim transcript are not available in the agency, major parties may agree to divide the cost. In any event, if a transcript is made, the judge should ensure that all interested persons can see the agency's copy at its offices and obtain copies pursuant to agency rules.

### D. Management of the Conference

The judge should prepare, and may circulate in advance, a conference agenda. Obviously those proposals or suggestions that affect the scope of the proceeding should be scheduled first. Although the conference may be informal, all remarks should be addressed to the judge, who should permit reasonable discussion. However, when a subject is fully aired, the judge should rule and move on.

Most conferences involve at least the following steps:

1. *Opening Statement*--The judge should announce the name of the case, the tentative agenda, conference procedures, the rights of persons to participate in the conference, and other pertinent matters.

2. *Appearances*--(Again, it should be emphasized that complex formal proceedings often have a number of parties, or would-be parties,<sup>93</sup> participating.) Blank appearance sheets should be available, which provide for the name and address of the person appearing and the name and the interest of each person represented.<sup>94</sup> The judge should direct that each party or interested person notify the reporter, or the judge if no transcript is made, of the name and address of one person to whom all documents should be sent. For convenience, oral appearances should also be entered.

3. *Preliminary Matters*--The judge should permit each participant to propose additional items and to raise preliminary matters--for example, an inquiry as to the anticipated duration of the conference.

4. *Participation*--The judge should rule immediately on requests to participate. Even if final rulings as to the right to participate are made by the agency, the judge can frequently make a tentative ruling, based on knowledge of agency standards, as to each person's right to participate in the conference and in the entire proceeding.

5. *Issues*--If final determination of the issues to be tried has been made before the conference, the conferees may consider the interpretation of the issues as framed. The judge should make any necessary rulings.

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<sup>93</sup>See 21 CFR §12.89(a) (1991) (Food and Drug Administration, participation of "nonparty participant").

<sup>94</sup>Form 2 in Appendix 1 is a sample appearance sheet.

If, on the other hand, determination of the scope of the proceeding is still tentative, the participants may submit any proposals for modification, clarification, or limitation. After discussion, the judge should rule, for conference-planning purposes, and the conference should continue on that basis. (If the agency should later disagree, a further conference may be necessary.)

6. *Discovery*--In complex cases, an early prehearing conference may need to address issues pertaining to discovery. Moreover, the prehearing conference itself can serve a discovery role. Each party, including agency staff, may request other parties to submit information, including specially prepared studies. Disposing of such requests and arranging for the preparation and exchange of the evidentiary material are frequently the most difficult conference functions. The judge, as well as agency staff, even though well-trained, experienced, and familiar with the subject matter, may not be able to determine whether objections to producing the requested material are induced by its lack of relevance, the burden of producing it, or a party's belief that it will be adverse to its interests. Moreover, even counsel for the party from whom the material is sought may not know the importance of the requested information, its availability, or the difficulty of assembly.

As difficult as these problems may be, it is preferable to face them at the conference. Otherwise they are merely delayed and will still have to be dealt with later in requests for subpoenas, depositions, and interrogatories, or by extensive correspondence. It is frequently quicker, easier, and more equitable to decide these questions after a full informal discussion at the conference than it is after formal motions to quash subpoenas or to strike material after it has been supplied. Moreover, if the rulings are made at the conference there may be time to modify them without delaying the proceeding if later developments show that some of the requested material is not necessary or obtainable or cannot be assembled as proposed.

When a party resists requests for necessary information the judge should direct that it be submitted. But in considering information requests the judge should reduce them to the minimum consistent with obtaining sufficient information to decide the issues. Most parties, including agency staff, tend to ask for the maximum data available so that they will have more from which to choose. The parties may agree to furnish requested material, even though they believe some of the data to be irrelevant or immaterial, because they do not want to antagonize agency staff or other parties or because the information is easily accessible.

The judge should not acquiesce in this course of least resistance. The difficulty in striking trivia at the hearing and in sorting out the important facts when deciding the case is compounded if the judge has to examine voluminous data that should never have been required or approved at the conference.

The difficulty in determining at the conference what information is needed may be mitigated in several ways: (1) agency rules may require that some or all of the direct evidence be filed with the application or petition;<sup>95</sup> (2) the agency's hearing order may require the parties to prepare and exchange direct, and perhaps rebuttal, evidence before the conference;<sup>96</sup> and (3) the judge at a preliminary conference may arrange for the exchange of requests for information which, if objected to, will be resolved at a reconvened conference.<sup>97</sup> The feasibility and utility of such devices depend on agency rules, the nature of the case, the number of known parties or interested persons, the extent of divergent interests, and the amount and type of material requested.

7. *Exchange of Information and Proposed Evidence*--Dates for the exchange of information and proposed evidence should be established, with the consent of the parties if possible. The time allowed should depend upon the nature of the material sought, the difficulty of preparation, the complexity of the issues, and the procedural time limits imposed by law or agency regulation.

Sometimes, in multiparty proceedings, one or more parties or interested persons may desire that a document be served on two or more persons in their organization, or they may not require some of the material requested by other parties. Consequently, the judge may request such persons to state what material they need, the number of copies, and the names and addresses of the persons to be served.

The judge's secretary may compile this information to be circulated to all parties either as a part of the prehearing conference report or in a separate document.

8. *Ground Rules*--To supplement the relevant statutes, the APA, and agency rules, the judge may establish special rules, frequently called "ground rules," for each individual case, covering such matters as order of presentation, motions, and cross-examination. It may also be appropriate for the judge to decide on rules for electronic submission of information. These may be adaptations of rules commonly used by the agency's judges or they may be tailor-made for the particular case.<sup>98</sup> Such rules may be unnecessary in

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<sup>95</sup>See, e.g., 18 CFR §157.5 (1991)(Federal Energy Regulatory Commission); 18 CFR §385.601(c)(2)(1991)(FERC).

<sup>96</sup>See, e.g., 12 CFR §19.31 (1991)(Comptroller of Currency, prehearing exchange of information); 29 CFR §2200.51 (1991) (Occupational Safety and Health Review Commission, prehearing conferences and orders). For an example of a case, see *Bluestone Energy Design, Inc.*, 58 FERC 63,025 (1992), where the Commission refers to an earlier hearing order directing parties to exchange narrative summaries of material points, exhibits, etc.

<sup>97</sup>See, e.g., 46 CFR §502.94(c)(1991) (Federal Maritime Commission).

<sup>98</sup>Form 3 in Appendix I is a sample set of ground rules.

relatively simple cases with experienced counsel, or the agency's judges may have standard rules that are adequate for most proceedings.

### E. Conference Report

A conference report consisting of a list of appearances, agreements reached, the judge's rulings, and other matters decided should, and sometimes must, be prepared and served on all persons who entered appearances.<sup>99</sup>

If final determination of the issues to be tried depends on a post conference ruling by the agency, then the conference report should include the judge's recommendations. If the agency disagrees with the judge as to the issues, and modifies them, the judge will have to decide whether another conference is necessary. Often the difference can be rectified in a supplemental report.

Exceptions should be limited to errors of substance. Further argument of a point decided at the conference should not be considered unless there are unusual circumstances. The judge should rule in a supplemental report on the exceptions, or make modifications or corrections. This does not necessarily commit the judge to the prescribed procedures; they can be modified later if necessary.

### F. Preliminary Motions and Rulings

All prehearing motions that are within the judge's jurisdiction should be decided promptly. Unless the ruling is self-explanatory or is the affirmation of a prior ruling, it should include a statement of reasons.<sup>100</sup> Many motions, petitions, and requests can be disposed of without a formal order; a notice or letter to all interested persons is sufficient.

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<sup>99</sup>Forms 4-a, 4-b, and 4-c in Appendix I are sample prehearing conference reports. For examples of agency regulations pertaining to the judge's or presiding officer's duty to prepare a summary reporting what transpired at a conference, see 10 CFR §2.751a(d) (1991) (Nuclear Regulatory Commission, construction permit and operating licensing proceedings); 15 CFR §788.12 (1991) (Department of Commerce, Bureau of Export Administration); 49 CFR §386.55(1991) (Department of Transportation, Federal Highway Administration).

<sup>100</sup>Form 5 in Appendix I is a sample interlocutory order.

## G. Other Prehearing Procedures

At the risk of being repetitious, it should be emphasized that a full-fledged, in-person prehearing conference is not always appropriate. If the issues are simple and the parties few, it may be unnecessary; if the proceeding is to be held in the field, it may be inconvenient for the ALJ to fly hundreds of miles for a conference. Any number of factors and variables may make a full-scale prehearing conference uneconomical or otherwise inadvisable. If actual discussions are needed as to particular points, a telephone conference can always be arranged.

When a conference is not feasible or desirable, other methods to organize and expedite a proceeding are available. For example, the judge may by written notice suggest the type of evidence needed,<sup>101</sup> or may direct the submission prior to the hearing of such material as a list of witnesses, a description of the material to be offered in evidence, and proposed stipulations. However, if a prehearing conference is not held, the judge should at least consult informally with all parties or their counsel prior to the official opening of the hearing to discuss and decide on hearing procedures.

In addition, a procedure formerly adopted by the U.S. Court of Federal Claims<sup>102</sup> provided for the development of information by the parties before the hearing without a prehearing conference.<sup>103</sup> This procedure, which is described in the U.S. Court of Federal Claims forms set forth in Appendix I,<sup>104</sup> appears adaptable to many administrative proceedings.

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<sup>101</sup>Forms 6-a-c in Appendix I are samples of prehearing orders and instructions to the parties.

<sup>102</sup>Since the first edition of this Manual, this Court has been variably known as the Court of Claims and as the U.S. Claims Court. Since 1992, its official designation is the U.S. Court of Federal Claims; this Manual uses the Court's current designation.

<sup>103</sup>Appendix G of the present Rules of the U.S. Court of Federal Claims still provides an excellent model for a judge who wants to ensure that the parties engage in substantial preconference development of their cases. Among other things, Appendix G provides for early communication between counsel to identify each party's factual and legal contentions, discuss discovery needs, scheduling, and possible settlement. It also requires a Joint Preliminary Status Report be filed by the parties. This Appendix (G) to the U.S. Court of Federal Claims Rules can be found in 28 U.S.C. Appx (Supp. II 1990), and 28 U.S.C.A Rules of the U.S. U.S. Court of Federal Claims Appx G (Supp. 1992).

<sup>104</sup>See Forms 18-a through 18-e in Appendix I.

## H. Settlement Negotiations and ADR Possibilities

### 1. Settlements

Settlement by negotiation should be considered at every step and stage of a proceeding. Depending on such variables as the nature of the issues, the parties, and applicable rules, a case might be settled as soon as assigned to a judge, shortly afterwards, during any of the usual prehearing procedures, during the hearing, at the close of the hearing, before decision by the judge, or even between the decision of the judge and the decision of the agency. Subject to agency rules, a settlement conference may be organized and conducted by the judge, or the judge may organize it and turn it over to the parties for action, or the parties may, with or without the judge's consent, hold private discussions so long as the rights of other parties or the public are not impaired.

Whenever it seems opportune, the judge should suggest settlement discussions. Sometimes, as the hearing proceeds and the parties hear the testimony and learn the facts, they will be more amenable to settlement. This applies not only to a full or partial settlement of the case but also to procedural questions. Frequently the parties may, after conferences, make important factual or procedural agreements.

The extent to which the judge should participate in settlement negotiations depends on agency practice and personal judgment. It is not uncommon for a judge to take an active role in such negotiation, especially in enforcement cases. However, too much involvement, or too active a role might raise doubts concerning the judge's ability to conduct a fair hearing or reach an equitable decision if negotiations fail. In such situations recusal might be appropriate.

As indicated earlier in this Manual,<sup>105</sup> one way to avoid the problems that could arise if the judge becomes too active in settlement negotiations is to use a settlement judge<sup>106</sup> or some other form of mediator.

More than 10 years ago, a survey of judges, including Chiefs, at 11 agencies indicated that, in addition to saving the time, cost, and energy involved in a formal hearing, a settlement can neutralize hostilities that might

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<sup>105</sup>See *supra*, text at notes 47-53.

<sup>106</sup>For examples of agency regulations pertaining to settlement judges, see 18 CFR §385.603 (1991) (FERC); 24 CFR §104.620 (1991) (HUD); 29 CFR §2200.101 (1991) (Occupational Safety and Health Review Commission); 47 CFR §1.244 (1991) (FCC); 48 CFR §6302.30 (1991)(DOT Board of Contract Appeals). See also General Order No. 13, U.S. U.S. Court of Federal Claims (April 15, 1987), reprinted in ADR Sourcebook, *supra* note 38, at 371.

be aggravated by litigation.<sup>107</sup> Many of the lessons garnered from that survey remain valid today and helped in the development of ADR in federal agencies, so it is worth discussing them further at this point.

The principal questions investigated in the survey were how to persuade parties to get together to consider settling their differences (whether substantive or procedural), and, once a meeting is arranged, how to get them to reach some agreement.

The survey suggested several ways of encouraging negotiations. Agencies could assign judges who are particularly adept at negotiating to handle settlement discussions. They could arrange training for judges in how to encourage negotiations without compromising their judicial independence. Other techniques available to individual judges, even before the ADR Act, clearly included the following:

- (1) Directing the parties to meet prior to the hearing to discuss settlement.
- (2) Issuing discovery orders requiring the exchange of basic facts and documents.
- (3) Holding telephone conferences to discuss settlement possibilities. The judge can suggest issues that appear amenable to settlement.
- (4) Submitting to the parties and interested persons pretrial statements on technical matters at issue, prepared by the judge's staff.
- (5) Setting early hearing dates to compel immediate consideration of the issues.
- (6) Meeting with the parties shortly before the hearing to discuss the case in light of discovery and other prehearing developments.

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<sup>107</sup>Coast Guard, Federal Communications Commission, Federal Energy Regulatory Commission, Federal Trade Commission, Interstate Commerce Commission, National Labor Relations Board, Occupational Safety and Health Review Commission, Securities and Exchange Commission, and the Departments of Health and Human Services, Interior, and Labor. The survey was conducted in 1979 and 1980. See G. Lawrence, Settlement Practices of Administrative Law Judges. Unpublished paper submitted to the Administrative Conference of the United States. (March 18, 1981).

Of course, the use of settlement techniques depends on the type of issues, the agency rules, and the personality, attitude, and training of the judge. Many cases cannot be settled, regardless of agency procedures or the judge's ability. But if the case is of the type in which settlement is possible, the judge should support all legitimate settlement efforts.<sup>108</sup>

## 2. ADR

As previously mentioned,<sup>109</sup> federal agency use of ADR increased substantially during the 1980s and culminated in the ADR Act of 1990. ADR is now--and for the foreseeable future--a subject of considerable significance to administrative law judges. For that reason, ADR was described and examined in some detail early in this Manual.<sup>110</sup>

However, the specifics of each agency's ADR programs are still being developed.<sup>111</sup> This development probably will be, and certainly should be, an ongoing process. ADR is still at an early stage as far as its use in administrative agencies is concerned. Indeed, as one article regarding ADR in general put it, "[W]e have only begun to identify the kinds of disputes likely to be amenable to the techniques of ADR."<sup>112</sup> One task for administrative law judges will be to aid in realizing the potential of ADR for the administrative process.

## III. Discovery

If authorized by statute and agency rule, the judge may require the parties to submit to discovery. This may consist of *subpoenas ad testificandum* and *duces tecum*, depositions, written interrogatories, cross-interrogatories, inspections, physical or mental examinations, requests for admissions, production of documents or things, or permission to enter upon land or other

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<sup>108</sup>See R. Fischer and W. Ury, *GETTING TO YES--NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2d ed. 1991).

<sup>109</sup>See *supra*, text at notes 64-80.

<sup>110</sup>See text *supra*, at notes 30-80.

<sup>111</sup>See, e.g., 56 Fed. Reg. 64737 (December 12, 1991) (ICC Notice of Proposed Rulemaking re: amending rules of practice and issuance of policy statement implementing the ADR Act); 57 Fed. Reg. 20238 (May 12, 1992) (FCC proposed rule mentioning pilot project) 57 Fed. Reg. 28701 (June 26, 1992) (Department of Labor notice of amendment to interim ADR policy).

<sup>112</sup>Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424, 438 (1986).

property, or the preparation of studies, summaries, forecasts, surveys, polls, or other relevant materials.

Discovery rulings may be made if the judge finds it necessary to apply compulsion to obtain the necessary information.<sup>113</sup> Supplemental discovery orders may be issued as needed. The judge should be attentive, throughout the discovery stage, to the possibility of delay resulting from abuse of the discovery process.

## A. Subpoenas

In some agencies, the judge must issue a subpoena upon request, subject to a motion to quash.<sup>114</sup> In other agencies, the judge may refuse to issue a subpoena absent a showing of relevance and need.<sup>115</sup> In either case, to prevent evasion of service, the subpoena usually is granted *ex parte* and its signing is not disclosed until either service has been accomplished or the party who obtained the *subpoena* chooses to disclose it.

Even if reimbursed for travel expenses and compensated by witness fees, a witness who is required to travel far from home will be inconvenienced at best, and may undergo severe hardship. Furthermore, *subpoenas duces tecum* may compel the transportation of bulky documents and may deprive a business of records and files needed for its daily operation. These burdens should not be lightly imposed.<sup>116</sup> The judge may in appropriate cases, and subject to agency rules, shift some of these burdens to the party seeking documents by permitting inspecting and copying of them on the premises where they are regularly kept. The judge also may encourage agreements between the parties providing for the submission of copies of specified material at the hearing, subject to verification procedures agreeable to the parties.

Sometimes subpoenas will be requested for material the judge has previously ruled need not be produced. Upon learning of this, the judge

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<sup>113</sup>See Freije, *The Use of Discovery Sanctions in Administrative Agency Adjudication*, 59 IND. L. J. 113 (1983); Tomlinson, *Discovery in Agency Adjudication*, 1 ACUS 37, 571, 577 (1971); Report in Support of Recommendation [70-4], 1 CFR §305.70-4 (1988).

<sup>114</sup>See, e.g., 29 CFR §2200.57 (1991) (Occupational Safety and Health Review Commission).

<sup>115</sup>See, e.g., FCC regulations, 47 CFR §1.333(c) (1980), and CAB regulations, 14 CFR §302.19 (1980). The relevant provision of the APA states: "Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." 5 U.S.C. §555(d) (1988).

<sup>116</sup>Cf. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 213 (1946)(dicta).

should deny the request unless it appears that the earlier ruling should be changed. It is not usually worthwhile, however, to search the record of a lengthy prehearing conference or other prehearing actions to determine whether the matter has already been considered. The subpoenaed witness can always move to quash.

Sooner or later a judge will encounter a party who refuses to comply with a subpoena. When that happens, the agency probably will have to file an enforcement action in federal district court.<sup>117</sup> The ensuing litigation can delay the agency's adjudication considerably,<sup>118</sup> but Supreme Court precedents strongly tend toward upholding an agency's subpoenas.<sup>119</sup> Moreover, the APA states, "On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law."<sup>120</sup> Once the agency's statutory authority to issue the challenged subpoenas is established, the subpoenas generally will be found to be in accordance with law "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."<sup>121</sup>

## B. Discovery and Confidential Material

When it is desirable to have an advance written exchange of confidential material, the judge should develop appropriate safeguards to ensure confidentiality. The judge may, for example: (1) obtain the commitment of the parties receiving the material to limit its distribution to specific persons; (2) ask unaffected parties to waive the receipt of certain material; or (3) issue appropriate orders. As an additional safeguard, ALL copies of such material should bear a prominent legend stating the limitations upon its distribution pursuant to the order of the judge.

In some agencies, such as the FCC or FTC, confidential information, particularly material claimed to be proprietary information or trade secrets, may be handled by procedures contained in a protective order issued by the judge.<sup>122</sup> The need for such an order often arises during prehearing discovery

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<sup>117</sup>For an example of an agency rule pertaining to enforcement of subpoenas, see 29 CFR §2200.57(d) (1991).

<sup>118</sup>*See, e.g.,* *FTC v. Anderson*, 631 F.2d 741 (D.C. Cir. 1979).

<sup>119</sup>*See* *CAB v. Hermann*, 353 U.S. 322 (1957) (production of all books and records covering a period of 3 years); *United States v. Morton Salt*, 338 U.S. 632 (1950).

<sup>120</sup>5 U.S.C. 555(d) (1988).

<sup>121</sup>*United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

<sup>122</sup>*See* *Exxon Corp. v. Federal Trade Commission*, 665 F.2d 1274 (D.C. Cir. 1981). For examples of agency regulations related to various protective orders, see 10 CFR §2.734 (1991)

when a party refuses to release material to an adversary party, an intervenor, or the agency staff without provision for confidential treatment. The request for the order is usually grounded on the claim that unrestricted release of the material may result in its misuse, such as unfairly benefiting competitors. To guard against misuse of the information the order should provide the terms and conditions for the release of the material. It should also contain an agreement to be signed by users of the material, and may include procedures for handling the material if offered in evidence, including, for example, prior notification to the party submitting the material of the intention to offer it as evidence, and provisions for sealing the pertinent portions of the record, briefs, and decisions.<sup>123</sup> In some situations the judge may find it easier to allow the parties to draft a proposed order for signature.

The judge must realize that protective order procedures could be inimical to the concept of a proceeding which is a matter of public record. Consequently, extreme care must be exercised in the issuance and application of the order to ensure that the integrity of the record is preserved and the rights of the parties and the public are duly considered.

*Moreover*, the order should make clear that it does not constitute a ruling that any material claimed by a party to be covered is in fact confidential and entitled to be sealed and withheld from examination by the general public.<sup>124</sup>

### C. Testimony of Agency Personnel and Production of Agency Documents

Testimony of agency personnel and the production of documents in agency custody must sometimes be restricted to protect the agency's investigative or decisional processes.<sup>125</sup> Consequently, some agencies provide special

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(Nuclear Regulatory Commission); 10 CFR §205.66 (1991) (Department of Energy); 12 CFR §308.07 (FDIC, listed among powers of administrative law judge); 14 CFR §13.220 (h) (1991) (FAA); 15 CFR §25.24 (Department of Commerce, Program Fraud Civil Remedies); 16 CFR §3.31(c) (1991) (FTC).

<sup>123</sup>Forms 19-a-d in Appendix I are sample protective orders. For examples of agency regulations related to various protective orders, see 10 CFR §2.734 (1991) (Nuclear Regulatory Commission); 10 CFR §205.66 (1991) (Department of Energy); 12 CFR §308.07 (FDIC, listed among powers of administrative law judge); 14 CFR §13.220 (h) (1991) (FAA); 15 CFR §25.24 (Department of Commerce, Program Fraud Civil Remedies); 16 CFR §3.31(c) (1991) (FTC).

<sup>124</sup>For further discussion of confidential material and administrative proceedings, see text at notes 241-47.

<sup>125</sup>See 5 U.S.C. §552(b) (1988). The cited statutory provision is part of the Freedom of Information Act [hereinafter FOIA], which deals with public access to federal government records, rather than discovery by private litigants. However, FOIA and discovery pertaining to

procedures applicable to discovery requests, such as requiring that they be referred to the agency either initially or upon interlocutory appeal by the agency staff.<sup>126</sup> The judge should assure that these procedures are not used frivolously or for clearly improper purposes.<sup>127</sup>

In *Jencks v. United States*<sup>128</sup> it was held that the defendant in a criminal prosecution has the right to examine all reports in the possession of the prosecution that bear upon the events and activities to which a prosecution witness testifies at trial. This principle has been extended to administrative proceedings in which the agency is an adversary.<sup>129</sup> Some agencies have adopted procedural rules specifically directed to the "Jencks" problem.<sup>130</sup> In deciding these issues, the judge, to the extent permitted by agency rules, may examine the statements in camera. To avoid delay at the hearing the judge may require the parties to submit such statements before the hearing.

#### D. Reports, Estimates, Forecasts, and Other Studies

Although most discovery questions that an administrative law judge may encounter will be fairly analogous to discovery issues confronting courts, there are some situations that have few or no counterparts outside of administrative agency proceedings. For instance, historical data, statistical or technical reports, forecasts, or estimates may have to be prepared, sometimes by more than one party. If so, it is frequently necessary for the judge to establish standard bases and time periods. In addition, it is sometimes necessary to specify in some detail the manner of preparation--by requiring, for example, that the parties use certain specified methods in preparing cost estimates. Use

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government records sought by private litigants obviously are related. At least some cases indicate that precedents construing one of the FOIA exemptions are not always irrelevant to issues involving discovery. See *McClelland v. Andrus*, 606 F.2d 1278, 1285, n. 48 (D.C. Cir. 1979), *Washington Post Co. v. U.S. Dept. of Health & Human Services*, 690 F.2d 252, 258 (D.C. Cir. 1982).

<sup>126</sup>See, e.g., 16 CFR §§3.23(a), 3.36 (1992) FTC regulations; 49 CFR §511.24 (1992) (National Highway Traffic Safety Administration).

<sup>127</sup>See *Domestic Cargo-Mail Service Case*, 30 CAB 560, 651 (1960).

<sup>128</sup>353 U.S. 657, 672 (1957). The principle of this case, with some modifications, was later codified, 18 U.S.C. §3500 (1988). This provision is applicable only to criminal cases.

<sup>129</sup>*Great Lakes Airlines v. CAB*, 291 F.2d 354, 363-365 (9th Cir. 1961), cert. denied, 368 U.S. 890 (1961); *NLRB v. Adhesive Product Corp.*, 258 F.2d 403, 408 (2d Cir. 1958); *Communist Party of the United States v. SACB*, 254 F.2d 314, 327-328 (D.C. Cir. 1958).

<sup>130</sup>See, e.g., 7 CFR §1.141 (g)(iii)(1991) (Department of Agriculture, providing that production of such documents "shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act"); 17 CFR §201.11-1 (1991) (SEC).

of such procedures should not prevent a party from supplementing its data with similar material in other forms, subject to the judge's discretion.

### E. Polls, Surveys, Samples, and Tests

As with reports, estimates and forecasts, information may be needed about habits, customs, or practices for which little reliable information is available--for example, the method of loading trucks, the volume of traffic along a particular route, or the percentage of travellers who prefer nonsmoking areas. Polls, surveys, samples, or tests may be the most feasible methods of obtaining the needed data. These may have been previously prepared by a party or an independent source for other purposes or they may be prepared specifically for the pending proceeding--either by one or more of the parties independently or with the consent and knowledge of the judge and the other parties as a part of the prehearing procedure.<sup>131</sup>

Polls, surveys, samples, and tests frequently raise serious questions of objectivity and reliability, especially if they have been prepared specifically for the proceeding in question. The judge should require the methods by which they were produced to be described in sufficient detail to permit a fair evaluation of these factors. If a poll, survey, sample, or test is proposed, and prior approval is requested, the judge should seek agreement among the parties on the methods to be used. The judge may grant such approval, subject to the parties having an opportunity to raise objections during the course of the hearing. In addition, the judge should ensure compliance with any relevant statutes and regulations concerning such surveys.

## IV. Prehearing Techniques for Expediting and Simplifying the Complex Proceeding

The formal administrative hearing often is quite similar to a trial before a judge sitting without a jury. One party may have a claim against another, as in workers' compensation. Or, a government agency may be proceeding against a private party who allegedly has not complied with some law or regulation, as in enforcement proceedings under the National Labor Relations Act,<sup>132</sup> or the Occupational Safety and Health Act,<sup>133</sup> or any of a large number of other laws

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<sup>131</sup>*Cf.* 18 CFR §156.5 (1991) (FERC, Application for Orders under Section 7(a) of the Natural Gas Act).

<sup>132</sup>29 U.S.C. §§151-68 (1988).

<sup>133</sup>29 U.S.C. §651 *et seq.* (1988).

under which sanctions can be imposed and violations remedied. Then of course there are cases involving claims for benefits or entitlements payable by the government, such as Social Security disability benefits or veterans' benefits. A word often used to describe such proceedings is "quasi-judicial." Typically, these quasi-judicial proceedings are nearly identical to a formal adjudication without a jury. Pleadings of some sort--complaint, charge, answer, response, etc.--are filed.<sup>134</sup> There are parties and prehearing discovery often is available. Witnesses testify orally on direct and cross-examination. The judge or other presiding officer usually disposes of the case by a decision, ruling, or order, with appeal to higher authority generally being available. In fact, the quasi-judicial, formal adjudicative model has been incorporated into administrative law and institutionalized by certain provisions of the APA,<sup>135</sup> which are triggered, with certain exceptions, by any statute that requires an adjudication to be determined on the record after opportunity for an agency hearing.<sup>136</sup>

Very often, these formal agency adjudications are relatively simple cases. There may be only a few witnesses; the sanctions may be small money penalties; the issues may be fairly straightforward; the hearing may last only a few hours, or less.

However, some formal agency adjudications can be much more complicated. Complex issues or several parties with conflicting interests may be very entangled. The resolution of a number of legal questions may be contingent on disputed facts that are the subject of weeks of testimony and volumes of documentary evidence. The substantive statutory law may require the agency to apply open-ended criteria, such as "unfair competition," to decide whether a fabric of calculated ambiguities, enigmatic business strategies, unconventional advertising policies and unusual accounting practices amount to "unfair competition." Moreover, some types of complex cases are not wholly comparable to our usual notions of adjudications. An agency's organic statute may compel the judge, and ultimately the agency, to "adjudicate" cases that involve public policy, rather than liabilities for noncompliance with the law or entitlements to benefits. To mention only a few examples, the agency may have to determine which of several competing applicants would better serve "the public interest" in contexts such as granting broadcast licenses, providing electric power service to consumers, or transportation.

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<sup>134</sup> See, e.g., 29 CFR §§2200.30-.41 (1991)(Occupational Safety and Health Review Commission).

<sup>135</sup> U.S.C. §§554, 556, 557 (1988 & Supp. II).

<sup>136</sup> U.S.C. §554(a) (1988).

Although it would be naive, and misleading, to draw a sharp line between "simple," and "complex" cases, the fact remains that there are some cases that take more of a judge's time and effort than others. This Manual, like everything else, is subject to limitations of time and space. As a matter of priorities, a chapter on techniques for expediting and simplifying complex proceedings probably will be more worthwhile than a chapter belaboring the somewhat more routine type of cases. There is less need for a chapter focusing on cases that are short (the hearing lasts a day or less), and involve few issues, few parties, few prehearing procedures, few exhibits, and a brief prehearing conference over the telephone. Certainly there is no strong need to develop special procedures to shorten the simpler hearing to save only an hour or two.

Complex cases are another matter. They may involve hearings lasting from a few days to a month or more, with many parties, many issues, and factual questions of enormous difficulty. Typically, much of the testimony is highly technical and lengthy, and is submitted in written form prior to the hearing. For example, a Federal Energy Regulatory Commission (FERC) adjudication may have scores of separately represented parties taking different positions and presenting evidence. A typical FERC case may involve disputes concerning hundreds of millions of dollars in increased electricity or gas costs. Hearings may last 2 or 3 months, with a record well in excess of 10,000 pages.<sup>137</sup>

Moreover, there is an increasing number of cases that, while not extremely large proceedings with many parties, are also not small and may involve complicated issues. The growing number of civil penalty proceedings is an example. While this Manual does not address such types of cases separately, judges can certainly draw selectively from the advice aimed here at larger, complex proceedings.

The emphasis in this chapter on complex cases carries no implication that the shorter case requires less technical or judicial skill than the complex one, or that the judge, regardless of agency or assignments, can competently perform the judicial function without being qualified for all types of cases, or that the judge trying simple cases has an easier task than the judge trying complex cases. The simple case frequently includes questions of credibility, the trying of which requires maximum judicial skill and dexterity. Furthermore, judges who hear only complex cases may decide only 10 to 25 cases per year; judges hearing simple cases frequently handle many times that number. For example, Social Security Administration judges handle an average of 450 cases per year.<sup>138</sup>

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<sup>137</sup>Federal Administrative Judiciary, *supra* note 4, at 849-50.

<sup>138</sup>Letter dated May 20, 1992 from Acting Chief Administrative Law Judge Jose A. Anglada, Office of Hearings and Appeals, Social Security Administration, to Morell E. Mullins, revisor of the 1992 edition of this Manual.

Still, for the complex case the judge must try to expedite the proceeding while developing a fair and complete record. To accomplish this, several procedural tools have been developed for simplifying and managing such proceedings. These tools, with minor modifications at different agencies, and for different types of proceedings, have been used successfully for many years. In addition, more recent innovations in ADR devices and techniques offer considerable promise for simplifying the complicated case.

Examples of possible or proposed improvements in the conduct of complex proceedings can take varied forms. More than 25 years ago, a leading practitioner advocated techniques for expediting formal proceedings by requiring most of the evidence to be submitted in written form, by making cross-examination subject to the discretion of the hearing officer, and by substituting a conference of lawyers and lay assistants for the formal hearing.<sup>139</sup> This approach does not seem to have been adopted completely by any agency, although it was suggested at the time that the Civil Aeronautics Board, for example, could have done so under then-existing law.<sup>140</sup> From time to time, bills have been introduced to amend the Administrative Procedure Act to broaden the circumstances in which agencies may substitute written procedures for oral testimony.<sup>141</sup>

Another innovative approach to complex cases is found in specialized procedures conducted by the Nuclear Regulatory Commission (NRC). The NRC is statutorily authorized to establish Atomic Safety and Licensing Boards, "each comprised of three members, one of whom [is] qualified in the conduct of administrative proceedings, and two of whom. . .have. . .technical or other qualifications. . .to conduct hearings. . .with respect to the granting, suspending, revoking or amending of any license or authorization under the provisions of this Act. . ." <sup>142</sup> As of the end of fiscal year 1990, the NRC had about 30 individuals who served on its Atomic Safety and Licensing Boards, and almost two-thirds of them were nonlawyers holding advanced degrees in engineering, physics, public health, medicine, or environmental science.<sup>143</sup>

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<sup>139</sup>Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659 (1964).

<sup>140</sup>*Id.* at 662.

<sup>141</sup>*Cf.* S. 262, 96th Cong., 2d Sess. (1980). It also should be mentioned that SSA ALJs often decide cases where most of the evidence is in written form, with additional testimony by key witnesses. See Anglada letter, *supra* note 137.

<sup>142</sup> 42 U.S.C. §2241(a) (1988). Relevant rules of practice governing proceedings before the Atomic Safety and Licensing Boards (and other NRC hearing bodies) are published in 10 CFR Part 2 (1992).

<sup>143</sup>Federal Administrative Judiciary, *supra* note 4, at 850-51.

When used, the technically qualified members of the Boards can contribute technical questions, comments, and observations in the resolution of preliminary or procedural matters and in the examination of technical witnesses. They take the lead in determining whether a Board has met its responsibility to develop a reliable record and in advising the panel when, and what type of, additional evidence is needed. The Board can complete the record by advising the parties to produce additional evidence on a specified matter. Although technical members are not permitted to make a decision based on their personal knowledge of the facts, they have a duty to clarify any contradictory testimony. This they may do by questioning a witness, calling for the production of more testimony, or by calling a Board witness. By the use of a hearing panel of this type, an agency has personnel, specially trained in all facets of its operations, participating continually in each administrative hearing.<sup>144</sup>

Although without legislation other regulatory agencies cannot assign persons not qualified as administrative law judges to preside over the taking of evidence in formal cases, there appear to be several NRC procedures that could be adopted by agencies using administrative law judges. Most agencies either have, or have authority to employ, technical assistants such as accountants and engineers to assist their judges. Such assistants, if technically qualified, should be able to provide the judge in a technical case the same type of information that technical members of NRC panels provide. A technical assistant might not be permitted to question witnesses and participate directly in the hearing, but attending the hearing and advising the judge, on the record, during the hearing should present no problems.<sup>145</sup>

In a similar vein, it is well-established that an administrative law judge can use an independent medical adviser as an expert witness in Social Security disability proceedings.<sup>146</sup> And certainly, with the passage of the ADR Act, various possibilities, especially the use of expert factfinding and neutral

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<sup>144</sup>Paris, *Role of the Scientist in NRC Administrative Proceedings*, 20 IDEA, The Journal of Law and Technology 357 (1979). See also U.S. Nuclear Regulatory Commission, *Statement of Policy on Conduct of Licensing Proceedings* (CLI-81-8) (May 20, 1981). Revisor's Note: The information the text paragraph above, regarding the Board procedures, although based on the 1982 edition of this Manual, was slightly revised for this edition on the basis of information provided to the revisor by Judge Ivan Smith, Nuclear Regulatory Commission, during a telephone conversation on March 26, 1992. A written summary of the conversation is in the revisor's files.

<sup>145</sup>For an article discussing legal and technical assistants to administrative law judges, see Mathias, *The Use of Legal and Technical Assistants by Administrative Law Judges in Administrative Proceedings*, 1 ADMIN. L. J. 107 (1987).

<sup>146</sup>See *Richardson v. Perales*, 402 U.S. 389 (1971).

evaluation techniques, immediately should come to mind as devices for possible use in complex agency proceedings.<sup>147</sup>

In addition to using panels, the Nuclear Regulatory Commission developed other procedures to improve the hearing process. A brief summary of some of those which were used by the Atomic Safety and Licensing Board in the *Three Mile Island, Unit 1 Restart Proceeding* follows:

1. *Lead Intervenor*--The intervenors are required to select a lead intervenor who consolidates the direct cross-examination with the other intervenors and then individually conducts the examination of the witnesses.

2. *Cross-Examination Plans*--Parties wishing to cross-examine on prefiled direct testimony are required to submit a plan that is kept confidential by the Board until trial of the issue. The plan must be in sufficient detail to inform the Board of the points raised and to assist the Board in regulating cross-examination. It must specify (a) cross-examination objectives, (b) affirmative evidence that the cross-examination is expected to produce, and (c) the direct testimony that the cross-examination is expected to discredit.

3. *Negotiations*--Negotiations, monitored by the Board, are required on procedural matters and specification of issues.<sup>148</sup>

Although procedures such as those described above may expedite the development of a complete record, efficiency still is not the only goal. Hearings must be conducted fairly and all interested persons who have something worthwhile to contribute must have an opportunity to participate. Moreover, the most efficient hearing conceivable can be rendered a near-total waste of time if this efficiency leads to prejudicial error and a case is reversed and remanded because of defective, unfair procedures. The rest of this chapter describes procedures and devices that have been used in various agencies for facilitating the conduct of complex cases.

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<sup>147</sup>See text *supra* at notes 30-80.

<sup>148</sup>Ruhlen, Manual for Administrative Law Judges 22-23 (1982) (citing conversation between Judge Merritt Ruhlen, author of 1982 edition of this Manual, and Judge Ivan Smith, Nuclear Regulatory Commission, and letter to Judge Ruhlen from Lawrence Brenner, Consulting Legal Counsel, Nuclear Regulatory Commission (December 1, 1980)).

## A. Written Exhibits in Complex Cases

The Administrative Procedure Act provides:

A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.<sup>149</sup>

Except where credibility or comparable issues are a primary concern, preparation and exchange of direct and rebuttal evidence in writing before hearing can be beneficial in complex cases. Furthermore, if such exchange of evidence is preceded by an exchange of information, subsequent proceedings are easier and the duration of the hearing is reduced. To obtain the maximum benefit the judge must study the proposed testimony before commencing the hearing.

The following pattern for the exchange of material, within reasonable but short time periods, is illustrative: first, each party furnishes information requested by others; second, each party submits its proposed direct evidence; third, each party submits rebuttal evidence; and fourth, each party submits surrebuttal, if any. Usually all parties observe the same exchange dates, though this may vary when appropriate. This pattern gives each party an opportunity (1) to examine information supplied by others before preparing its direct evidence; (2) to study the direct evidence of others before preparing rebuttal; and (3) to prepare cross-examination and procedural motions without interrupting the hearing or having to study the transcript during recesses.

Even when the parties cannot be required to submit all evidence in writing, they often may agree to present most of it in written form. Experienced counsel recognize that the advantages are many and the disadvantages few.

Oral testimony may be necessary if a witness is hostile or is not under the control of the party seeking the testimony, or if new evidence is discovered after the exchange of written evidence.

Written evidence is usually prepared in the form of exhibits, which may include narrative statements, testimony in question-and-answer form, tables, charts, or other documentary material. Each exhibit, if not self-explanatory, should contain notes or narrative to explain its meaning or purpose. Each

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<sup>149</sup>5 U.S.C. §556(d) (1988). See also *Central Freight Lines, Inc. v. United States*, 669 F. 2d 1063 (5th Cir. 1982) (cross-examination not an absolute right under the APA).

separate document should be given an exhibit number, a symbol identifying the party submitting it, and, perhaps, a symbol identifying its subject. Each volume of exhibits should include a table of contents or index. If an exhibit contains extensive written testimony, it should have a separate index of the subjects covered.

Since the judge must rely on such an index or table of contents when preparing the decision or a personal index of the record, the parties should be informed that the titles must aptly and precisely describe the contents. The parties should be particularly admonished to avoid argumentative titles, or "singing titles," as they are sometimes called.

## B. Elimination or Curtailment of Hearing Suspensions

Emergencies, or unexpected occurrences, sometimes require a suspension of the hearing. Counsel or a witness may become ill, an out-of-town witness may be delayed, counsel may have to appear in another forum, or it may be necessary to enforce a subpoena or other discovery process, or to prepare rebuttal or cross-examination with respect to newly discovered evidence.

Unfortunately, in some agencies the unnecessary or frequent suspension or recessing of hearings for substantial periods has become almost a regular practice, especially in complicated or multiparty cases. Repeated suspensions, each lasting from a week to several months, can cause a hearing to go on for years.

Protracted or frequent suspensions are usually unnecessary. Requests for suspensions are frequently based on assertions that additional time is needed (1) to prepare cross-examination; (2) to prepare a defensive case or rebuttal after hearing the proponent's case; or (3) to devise defensive strategy after cross-examination of the adversary's witnesses.

If a complex, multiparty proceeding is carefully organized in the manner outlined in Chapter II, counsel in most cases can complete substantially all of the basic preparation before the hearing commences. Delay can be reduced and nearly eliminated by such procedures as: (1) requiring inclusion of the direct case with the original petition or application; (2) exchanging direct and rebuttal evidence before hearing; and (3) using rebuttal experts rather than cross-examination to answer expert testimony. The relative merits of cross-examining experts as compared with the use of rebuttal experts have been discussed in an article by Judge Benkin of the Federal Energy Regulatory Commission.<sup>150</sup>

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<sup>150</sup>I. Benkin, *Is it Bigger than a Breadbox? - An Administrative Law Judge Looks at Cross-Examination of Experts*, 21 *AIR FORCE LAW REVIEW* 365 (1979).

### C. Stipulations and Official Notice of Documentary Material

Stipulations and official notice can avoid much factual presentation. Some agencies have provided by rule a list of the documents that will be officially noticed.<sup>151</sup> In the absence of, or in addition to, such a list the agency, the judge, or both, may announce that official notice will be taken of certain specific material, subject to the right of any party on timely request to introduce contradictory evidence.<sup>152</sup> The parties should be directed at the prehearing conference or by written notice to cite specifically any material of which they request official notice.

Parties frequently agree to stipulate to the existence of certain facts or, even more often, to the reception of certain evidence without oral sponsorship. In multiparty proceedings the judge may have the authority to appoint a continuing committee composed of representatives of the parties to consider and recommend stipulations.

The judge's instructions or the agency rules concerning exhibits may provide as follows: (1) if a party wishes an exhibit to be received in evidence without oral sponsorship, a written request shall be submitted to the judge and all parties, accompanied by the exhibit in question and by a statement signed by the person sponsoring it that it was prepared by or under the sponsoring person's direction and is true and correct; (2) within a specified time prior to the hearing any party desiring to cross-examine with respect to any such material shall give the judge and the parties written notice specifying the witness and the exhibit involved and the matters or parts of the exhibit upon which cross-examination is desired; and (3) if no request for cross-examination is received, the exhibit shall be received in evidence without oral sponsorship, subject to objection on other grounds.<sup>153</sup>

### D. Intervention and Participation by Nonparties<sup>154</sup>

In some proceedings only the designated parties and the agency take part-- for example, proceedings for the revocation or suspension of licenses or permits, or for the imposition of civil money penalties. Other proceedings

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<sup>151</sup>14 CFR §302.24(n) (1991) (DOT, Aviation Proceedings); 49 CFR §1180.4 (1991) (ICC).

<sup>152</sup>5 U.S.C. §556(d) (1988).

<sup>153</sup>*See, e.g.*, 46 CFR §201.131(d) (1991) (DOT, Maritime Administration); 42 CFR §1005.8(c)(1992) (HHS, Medicare Fraud Civil Penalty Proceedings).

<sup>154</sup>*See* ACUS Recommendation 71-6, "Public Participation in Administrative Hearings," 1 CFR §305.71-6 (1992).

may attract participation by many people--for example, Nuclear Regulatory Commission plant siting cases and Interstate Commerce Commission track abandonment cases. An agency may provide for different categories of participation: for example, *intervention* by interested persons wishing to become parties to the proceeding, thereby assuming all of the rights and duties of parties;<sup>155</sup> or various forms of *limited participation* by interested persons who have insufficient interest or inadequate resources to assume party status.<sup>156</sup>

Petitions to intervene must be handled expeditiously because persons cannot prepare their cases properly until they know their official status. If the judge has authority, a ruling should be made promptly; if not, the petitions should be immediately referred to the agency.<sup>157</sup> Some agencies have specific requirements for intervention.<sup>158</sup> Others have generalized criteria.<sup>159</sup>

Although it is easier to manage a proceeding if all persons comply with the same rules, there are obvious advantages in providing a mode of limited participation for persons with limited interests that would be less expensive or burdensome than participation as a party. Agencies that allow such limited participation typically give the judge substantial discretion as to the scope of activity allowed.<sup>160</sup>

The judge should explain the rights of participants to inexperienced or uninformed persons, and should devise ways for them to introduce evidence or state their position with minimal disruption of orderly procedure. Generally,

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<sup>155</sup>See, e.g., 14 CFR §§302.14, 302.15 (1991) (DOT Aviation Proceedings); 47 CFR §§1.223-225 (1991) (FCC).

<sup>156</sup>See, e.g., 12 CFR §19.21 (1991) (Comptroller of the Currency, "Limited Participation by Nonparties"); 17 CFR §10.34 (1991) (Commodity Futures Trading Commission [CFTC], "Limited Participation"); 17 CFR §10.35 (1991) (CFTC, "Permission to state views"); 17 CFR §201.9 (1991) (SEC: "Parties and limited participation"); 29 CFR §2200.21 (1991) (Occupational Safety and Health Review Commission: "Intervention: appearance by nonparties").

<sup>157</sup>Form 9 in Appendix I is a sample order granting, denying, and dismissing various petitions to intervene.

<sup>158</sup>See, e.g., 14 CFR §302.15 (1991) (DOT Aviation).

<sup>159</sup>See, e.g., 12 CFR §308.23(a) (1991) (FDIC; would-be intervenor: (1) has a substantial interest relating to the action, (2) the interest may not be adequately represented without intervention; (3) intervention will not delay proceeding or unfairly prejudice another party).

<sup>160</sup>See, e.g., 14 CFR §13.206(b) (1991) (FAA: "The administrative law judge may determine the extent to which an intervenor may participate in the proceedings.") 16 CFR §3.14(a) (1991) (FTC: "The Administrative Law Judge or the Commission may permit the intervention to such extent and upon terms as are provided by law or otherwise."); 17 CFR §201.9(d) (1991) (SEC: "Leave to be heard . . . may include such rights as a party as the hearing officer may deem appropriate. . . ."); 29 CFR §2200.21(c) (1991) (Occupational Safety and Health Review Commission: "The Commission or Judge may grant a petition for intervention to such an extent and upon such terms as the Commission or the Judge shall determine.")

the judge may permit any person to appear, present evidence, submit argument, or cross-examine subject to the judge's supervision. A reasonable limitation on the number of persons permitted to submit similar evidence or arguments may be imposed. The judge may call such persons as witnesses and question them to develop facts or their point of view. Or, if there is no conflict of interest, or comparable problem, the judge may request agency staff to assist such persons or groups.

In complex, multiparty, multi-issue cases, the judge may be authorized to limit the required distribution of documents to those persons who have a direct interest in the pertinent issue--subject, of course, to the right of any participant to request copies of material distributed to other participants. Interested persons or groups with modest resources may be permitted to file copies of their documents in the agency's public reference room instead of reproducing and mailing them to all parties; or, if the material is extremely brief, it may even be read at the hearing without prior delivery to the parties.

Another possibility is to permit parties with limited resources to submit written testimony without being subject to cross-examination. This can frequently be done by stipulation. In any event, subject to agency rules, such procedure may be authorized on the judge's own motion. Arrangements can vary with each case, but the judge should give each interested person as full and convenient an opportunity to participate as is consistent with that person's needs, the rights of others, and the efficient management of the proceeding.

## E. Joint Presentations

Persons or groups having the same or similar interests may be encouraged to present part or all of their cases jointly, thereby easing the financial and work burden of each, saving the time of the other parties, and shortening the record. The judge may also encourage such persons or groups to select a single counsel to handle their cross-examination.

In cases of extreme complexity, with many parties, the judge may be able to *require* parties with the same or similar interests to be represented by a single counsel, or to join together in presenting a particular phase of their case.<sup>161</sup> This may include direct examination, cross-examination, and briefing. The judge may permit separate questions or argument about particular matters upon request by any counsel who shows a position differing from other

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<sup>161</sup>*See, e.g.*, 21 CFR §15.21(c) (1991) (FDA: "Public Hearing Before the Commissioner"); 40 CFR §124.121(6) (1991) (EPA: presiding officer may require such parties to choose a single representative for purposes of cross-examination); 39 CFR §3001.20a(c) (1991) (Postal Rate Commission).

members of the group, or who demonstrates that a request to develop a point has been denied by the group counsel.

## F. Organizing the Complex or Multiparty Hearing

Except in the shorter or simpler cases, the order of oral presentation should be established well before the hearing--in the prehearing conference report or by other notice.

The party with the burden of persuasion or proof should usually make the initial presentation, followed first by persons in support, second by persons in opposition, and then by others, if any. This order may be varied to fit the specific case. For example, frequently it is convenient to hear civic or consumer groups or individual participants with comparatively short presentations first. Or such participants may be permitted to appear at a scheduled time even though this interrupts other testimony. In multiparty proceedings each category of parties might be heard in alphabetical order or in any other convenient sequence.

Some parties or interested persons may find it impossible, or extremely inconvenient or expensive, to be represented at all sessions of the hearing. This is particularly true in lengthy and complicated cases with multiple issues, some of which are of no interest to certain participants.

While a party and counsel are responsible for protecting the party's interest at all times, the judge should take reasonable action, consistent with adjudicatory responsibilities, to prevent the absence of the party and counsel from prejudicing the party's interest. Any person's scheduling problems may be called to the attention of counsel and counsel may be requested to take reasonable action to keep such persons informed as to the progress of the hearing. Usually the most that is involved is counsel's telephone call. Counsel will frequently oblige out of professional courtesy.

Major changes in scheduling, such as recalling a witness or having an additional day of hearings, will often inconvenience other parties. In some instances, however, the judge may be able to make minor changes, such as recessing a hearing early and advising counsel to be present at the next session so that counsel can hear the pertinent testimony. The judge should encourage reduction of these problems by informal agreement among counsel--for example, agreement that certain issues will not be pursued on certain days or that upon request counsel will advise an absent party when a specific matter will be presented.

## G. Special Committees

When numerous parties or persons enter appearances it may be possible, and advisable, to designate a representative for each identifiable group to discuss with the judge and other parties interim or emergency procedures. Through a committee of such representatives, the judge or any party may communicate with each group to obtain its viewpoint or position. If any person objects to this procedure and does not wish to be represented, it is usually a simple matter to give him personal notice.

## H. Telephone or Videophone Conference

Conferences can be conducted either by telephone or videophone. Such a procedure is specifically authorized at the Federal Communications Commission.<sup>162</sup> It can eliminate the expense and inconvenience of travel or the delay of correspondence. It is also helpful when immediate access to data at a party's home office is desirable.

The use of telephone conferences has increased rapidly.<sup>163</sup> Although it may not be a practical means of conducting a large conference with many parties or numerous issues, such as a prehearing conference in a complicated rate or route case or a merger, it may save much time and travel in a case with simple issues or few parties. It may also be helpful and save time in complicated cases when a party has a simple procedural question. For example, when a postponement is requested, a party by a telephone call to the judge may initiate a telephone conference with representatives of the principal parties in order to solve a problem that would require weeks of correspondence or numerous telephone calls.

Videophones have seldom been used for conferences. With improved and simplified technology, and the prospect of increasing travel costs, it is probable that the use of videophone conferences will increase.<sup>164</sup>

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<sup>162</sup>47 CFR §1.248(f) (1991).

<sup>163</sup>See Hanson, Mahoney, Nejelski, and Shuart, *Lady Justice--Only a Phone Call Away*, 20 JUDGES' J. 40 (No. 2, Spring 1981), and accompanying notes on personal experiences with telephone conferences. For some practical guidance, see the ABA's booklet, *Telephone-Conferenced Hearings: A How-To Guide for Judges, Attorneys, and Clerks* (1983). For a case upholding procedures where the actual hearing was conducted by telephone conference, see *Casey v. O'Bannon*, 536 F. Supp. 350 (E.D. Pa. 1982).

<sup>164</sup>Bulkeley, *Eye Contact: The Videophone Era May Finally Be Near, Bringing Big Changes*, Wall. St. J., March 10, 1992, at 1, col. 6.

If telephones or videophones are used the judge is responsible for maintaining a precise record. At a minimum, the judge should insist that participants state their names each time they speak and that all documents referred to be clearly identified.

## I. Additional Conferences

Additional conferences, if needed, may be called at any time. These serve the same purposes as the original prehearing conference, as well as to rectify or revise procedures that have broken down or to cope with new problems. Sometimes an additional conference may be scheduled at the opening of the hearing; but if further prehearing preparation is likely to be needed, the conference is best scheduled a reasonable time before the hearing.

## J. Trial Briefs or Opening Statements

Some cases, particularly complex ones, can be facilitated by trial briefs stating the principal contentions of the parties, the evidence to be presented and the purposes for which it is submitted, the names of the witnesses, and the subjects each witness will discuss. Such briefs may also present the results of research the judge has requested on legal or technical problems. The judge may instruct each party to include in the brief any procedural motions and requests, such as motions to bar proposed written evidence. In lieu of or in addition to the trial brief, the judge may require, or permit, an opening statement by counsel.

## K. Interlocutory Appeals

The rules of some agencies prohibit an immediate appeal from an interlocutory ruling without the judge's permission and a finding that the allowance of an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to any party.<sup>165</sup> Strict application of this rule prevents unnecessary delay, avoids consumption of the agency's time on minor procedural matters, and saves the time and labor of the persons who would

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<sup>165</sup>*See, e.g.*, 49 CFR §821.16 (1991) (NTSB). For a facially absolute prohibition, see 15 CFR §904.253(c) (1991) (Department of Commerce, National Oceanic and Atmospheric Administration: "No interlocutory appeal lies as to any ruling not certified by the Judge."). *See also* ACUS Recommendation 71-1, "Interlocutory Appeal Procedures," 1 CFR §305.71-1 (1992).

have to participate in the appeal.<sup>166</sup> Such rulings are subject to review when the case is before the agency for review on its merits.<sup>167</sup> Other agencies, although not always requiring an affirmative finding by the judge that an appeal is desirable, may impose such restrictions as to make permission of the judge and affirmative findings necessary except in a few specified circumstances.<sup>168</sup>

## L. Mandatory Time Limits

To speed up administrative proceedings, Congress by statute,<sup>169</sup> and some agencies by regulation,<sup>170</sup> have sometimes imposed time limits for completion of some or all of the steps in formal administrative proceedings. Rigid time limits often have undesirable consequences, but when imposed they do provide participants early notice of the time available and they also provide the judge with authority and support for the imposition and enforcement of deadlines. This authority, of course, can be used to expedite and streamline complex cases.<sup>171</sup>

The Administrative Conference of the United States, long familiar with the delays involved in complex administrative proceedings, considered this problem in 1978.<sup>172</sup> At that time it found that rigid statutory time limits tended to undermine an agency's ability to establish priorities and to control the course of its proceedings, and that such limits enabled outside interests to impose their priorities upon an agency through suit or threat of suit.

The Conference recognized, however, the value of time limits for reducing administrative delay and recommended that time limits should be established

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<sup>166</sup>Form 7 in Appendix I is a sample submission to the agency of an appeal from an interlocutory ruling.

<sup>167</sup>See 5 U.S.C. §557(b) (1988) (reviewing agency has all powers it would have had if it had made the initial decision, subject to agency's own rules or orders).

<sup>168</sup>See, e.g., 16 CFR §3.23(a) and (b) (1991) (FTC); 17 CFR §10.101 (1991) (Commodity Futures Trading Commission).

<sup>169</sup>See, e.g., 19 U.S.C. §1337 (1988); 19 CFR §§210.41(e), 210.53(a) (1992), (USITC).

<sup>170</sup>See, e.g., 17 CFR §10.84(b)(1992) (CFTC); 16 CFR §3.51 (1992) (FTC).

<sup>171</sup>See, e.g., 5 CFR §1201.173(f)(1) (1992) (Merit Systems Protection Board: "Because of the short statutory time limit for processing these cases, parties must file their submissions by overnight Express Mail. . .if they file their submissions by mail."); 29 CFR §525.22 (1991) (Department of Labor, Wage & Hour Division: "Because of the time constraints imposed by the statute, requests for postponement shall be granted only sparingly and for compelling reasons.").

<sup>172</sup>E. Tomlinson, *Report on the Experience of Various Agencies with Statutory Time Limits*, 1978 ACUS Recommendations and Reports 119; ACUS Recommendation 78-3, "Time Limits on Agency Actions," 1 CFR §305.78-3 (1992).

by the agencies rather than by statute. It advised, further, that if Congress does enact time limits, it should recognize that special circumstances may justify an agency's failure to act within a predetermined time, and it should require agencies to explain departures from the legislative timetable in current status reports to affected persons or to Congress.<sup>173</sup>

Although statutory time limits may hinder the efficient and fair processing of some cases, and may be impossible to meet in others, the judge should, if possible, adopt procedures and rules which meet these deadlines. The judge should always keep accurate records of the steps involved and any difficulties encountered that will explain any failure to meet time limits. Such information can be of value to the agency or the Congress in appraising both agency performance and the appropriateness of time limits.

### M. Summary Proceedings

Delays in the administrative process can be avoided by eliminating or curtailing evidentiary hearings when no genuine issue of material fact exists or when the factual evidence can be submitted in written form.

The Administrative Conference of the United States has recommended the adoption of procedures providing for summary judgment or decision.<sup>174</sup> The Conference's recommendation contains a model rule that was adopted nearly verbatim by several agencies, including the Commodity Futures Trading Commission,<sup>175</sup> the Federal Communications Commission<sup>176</sup> and the Federal Trade Commission.<sup>177</sup> Other agencies, including the Consumer Product Safety Commission,<sup>178</sup> the Environmental Protection Agency,<sup>179</sup> and the Interstate Commerce Commission<sup>180</sup> have rules that substantially comply with the ACUS recommendation. In fact, provision for summary decision is quite common in agency regulations.<sup>181</sup>

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<sup>173</sup>*Id.*

<sup>174</sup>Recommendation 70-3, "Summary Decision in Agency Adjudication," 1 CFR §305.70-3 (1992).

<sup>175</sup>17 CFR §§10.91-10.92 (1992).

<sup>176</sup>47 CFR §1.251 (1991).

<sup>177</sup>16 CFR §3.24 (1992).

<sup>178</sup>16 CFR §1025.25 (1992).

<sup>179</sup>40 CFR §§164.91, 164.121 (1992).

<sup>180</sup>49 CFR §§1100.43-.52 (1992).

<sup>181</sup>*See, e.g.*, 10 CFR §2.749 (1991) (Nuclear Regulatory Commission); 21 CFR §12.93 (1991) (FDA); 29 CFR §1905.41 (1991) (Department of Labor, variances from safety and health standards); 29 CFR §2570.67 (1991) (Department of Labor, Pension & Welfare Benefits,

Moreover, explicit agency regulations may not be absolutely necessary. Although the Federal Energy Regulatory Commission's rules did not specifically authorize the judge to use summary proceedings, the Commission ruled that under the judge's powers to control a proceeding and to dispose of procedural matters there was authority to rule on motions for summary judgment.<sup>182</sup> Thus, the Federal Energy Regulatory Commission's precedents suggest that, unless specifically forbidden, a judge could use this procedure under general powers to control a formal proceeding.<sup>183</sup>

Judges handling cases amenable to summary disposition may benefit from consulting the appropriate provisions of the Federal Rules of Civil Procedure and referring to Professor E. Gellhorn's discussion of the summary decision in his report to the Administrative Conference of the United States in support of the Conference's recommendation.<sup>184</sup>

## N. ADR

It almost goes without saying that ADR and the authority of agencies created by the ADR Act<sup>185</sup> will offer even more opportunities for judges to streamline all sorts of difficult and complex cases. The judge now can be authorized, among other things, to hold conferences addressing the use of ADR procedures, to encourage the use of ADR methods, and even to require attendance at conferences by representatives of parties who have the authority to negotiate concerning the resolution of issues in controversy.<sup>186</sup> ADR's potential for expediting and simplifying complex proceedings has barely been tapped. Techniques such as mediation, neutral evaluation, the settlement judge, minitrials, and arbitration<sup>187</sup> will become available in various

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assessment of civil penalties); 29 CFR §2700.64 (1991) (Federal Mine Safety and Health Review Commission).

<sup>182</sup>Minnesota Power & Light Company, Docket No. ER78-425 (March 26, 1979); and Texas Eastern Transmission Corporation, 10 FERC ¶63,068 (April 30, 1980).

<sup>183</sup>See *Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980) (request for hearing did not set forth material issues of fact).

<sup>184</sup>See E. Gellhorn and W. Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971).

<sup>185</sup>See text *supra*, at notes 28, 64.

<sup>186</sup>See text *supra*, at notes 27-29.

<sup>187</sup>See *supra*, text at notes 34-61.

agencies.<sup>188</sup> Ingenuity and innovation will suggest new hybrids. There will be challenges, as in the past, to adapt to changing circumstances. There will also be opportunities once more to demonstrate how versatile and valuable administrative law judges, as an institution, can be.

## V. Hearing

### A. Preparation

#### 1. Notice

A notice of hearing complying with statutory requirements and agency rules should be served upon all parties.<sup>189</sup> In addition, statutory provisions or agency rules may require notice to be published in the Federal Register.<sup>190</sup> Even though responsibility for notice may fall on agency staff, the judge should personally make certain that all legal requirements are complied with and that all persons who participated in the prehearing conference or who requested notice receive actual notice.

#### 2. Place of Hearing

The APA, with respect to formal adjudicative hearings, provides expressly that "due regard shall" be paid to the "convenience and necessity of the parties" in fixing the place, and time, of hearings.<sup>191</sup> Accordingly, the judge should consider holding the hearing in the field if anyone suggests it. Agency rules and unavailability of travel funds may override the judge's willingness to

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<sup>188</sup>*See, e.g.*, 48 CFR §6302.30 (1991) (DOT Board of Contract Appeals; states that Board has adopted two ADR methods, Settlement Judges and Minitrals); 57 Fed. Reg. 28701 (June 26, 1992) (Department of Labor, Notice of amendment to interim ADR policy; regional pilot program using in-house mediators, trained by Federal Mediation & Conciliation Service, in a full range of cases); 57 Fed. Reg. 20238 (May 12, 1992) (FCC; pilot project applicable to all proceedings before FCC).

<sup>189</sup>Forms 10-a and 10-b in Appendix I are examples of notices of hearing.

<sup>190</sup>For examples of regulations regarding publication of notice in the Federal Register, see 7 CFR §1200.5 (1991) (Department of Agriculture); 10 CFR §2.104 (1991) (NRC); 16 CFR §3.72 (1991) (FTC, Reopening); 21 CFR §1301.43 (1991) (Drug Enforcement Administration, application for bulk manufacture of Schedule I and II substances); 40 CFR §179.20 (1991) (EPA, Formal Evidentiary Public Hearing).

<sup>191</sup>5 U.S.C. 554 (b) (1988).

hold field hearings. (However, agency rules quite commonly track the APA with respect to the place of hearing.)<sup>192</sup> In the absence of budget constraints or clearly applicable agency rules, factors to be considered are the convenience of interested persons, the suitability of the hearing facilities involved, and the locations of the parties and witnesses. Sometimes, when several geographical areas are affected or interested persons have different places of business or interest, it may be desirable to hold sessions in two or more places. In some agencies such as the Social Security Administration and the Occupational Safety and Health Review Commission, the problem of travel is reduced by stationing judges in the field. Even so, the judges of such agencies frequently travel in order to hold hearings at sites convenient to the parties and witnesses.

In agencies where field hearings are not fairly routine, the site of the hearing often is an ad hoc matter. Especially in such agencies, another factor to be considered is the nature of the parties. For example, if a private party is seeking a lucrative privilege or a benefit such as a license, it may be fair to place the travel burden on the party. However, if the agency threatens imposition of a sanction or withdrawal of a license, it may be more equitable to hold the hearing at the place requested by, or convenient to, the respondent.

An early determination of the place of hearing benefits all parties. If a prehearing conference is held, the judge should announce the time and place of hearing either at the conference or in the conference report. If no conference is held, the announcement is made in the Notice of Hearing. In cases where a field hearing is scheduled, the hearing may, where appropriate, be publicized in the local communities affected.<sup>193</sup>

### 3. Hearing Facilities

Comfortable and functional hearing facilities are of real assistance in developing an accurate record. Most agencies have satisfactory hearing facilities at their home offices. Moreover, the judges of agencies that commonly hold field hearings may develop and share an extensive network of contacts with governmental and nongovernmental bodies that can provide suitable hearing facilities. However, locating and obtaining such facilities still

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<sup>192</sup>See, e.g., 7 CFR §47.15(c) (1991) (Department of Agriculture, reparation proceedings); 10 CFR §2.703 (1991) (Nuclear Regulatory Commission, domestic licensing proceedings); 14 CFR §13.55 (1991) (FAA); 29 CFR §18.33 (Department of Labor); 29 CFR §2200.60 (1991) (Occupational Safety and Health Review Commission, "as little inconvenience and expense to the parties as is practicable"; 49 CFR §821.37 (1991) (NTSB, air safety proceedings).

<sup>193</sup>See 7 CFR §900.4 (1991) (Department of Agriculture, proceedings for marketing orders); 7 CFR §1200.5 (1991) (Department of Agriculture, proceeding under research, promotion, and education programs); 29 CFR §523.5 (1991) (Department of Labor, press release 5 days before hearing); 40 CFR §142.33(a) (1991) (EPA, drinking water, newspaper of general circulation).

may be difficult, especially for a judge whose agency rarely holds field hearings. There are several potential sources of information about hearing facilities: other federal administrative law judges; the offices of hearings and appeals of various federal agencies; local and regional offices of various federal agencies; state administrative law judges or hearing officers (especially those in agencies such as workers' compensation); and state agencies themselves. These are only some of the sources that may provide information helpful in locating hearing facilities. Another source of information about hearing facilities is the regional office of the GSA Public Building Service, or the manager of a federal building in the area where the judge contemplates holding the hearing.

If all else fails, the judge may be able to obtain adequate facilities by making arrangements directly with a local college, school, library, civic association, hotel, or any other public or private organization with satisfactory facilities. Counsel or interested persons in the area may provide assistance. In some agencies the staff arranges for the hearing room subject to the judge's approval.

The judge should inspect the hearing room a substantial time before opening the hearing, if possible, to check the heating or air conditioning, lighting, furniture arrangement, seating facilities, and the public address system. The furniture should be arranged so that everyone in the room can see and hear the witnesses, and the reporter can see and hear the judge, the witnesses, and counsel.

The judge is responsible for the hearing room and furniture, and should take care to maintain them in the condition in which they are received. The judge should remind participants to refrain from unauthorized use of telephones that may be found in the hearing facilities. Smoking or eating in the hearing room should be prohibited whether or not the hearing is in session. If night or weekend sessions are contemplated the judge should make necessary arrangements for opening and closing the room. If parties must leave documents overnight in the hearing room, the judge should arrange for overnight security.

## B. Mechanics of the Hearing

There is no rigid script for a formal administrative hearing, although traditionally the party with the burden of proof makes the first presentation. Still, the organization and form depend upon such factors as agency rules, the type of case, the issues, the number of parties and witnesses, agency custom,

and the temperament of the judge. The one universal criterion is the development of a fair, adequate, and concise record.

A formal administrative hearing should possess substantially the same formality, dignity, and order as a judicial proceeding. It should move as rapidly as possible, consistent with the essentials of fairness, impartiality, and thoroughness.

## 1. Transcript

Formal proceedings are recorded verbatim.<sup>194</sup> The reporter may use shorthand, stenotype, or any other recording device. (In some agencies, the rules may authorize or contemplate tape recording, rather than stenographic reporting.<sup>195</sup>)

Agency rules and policies vary considerably when it comes to the cost of transcripts to a party or other interested person. In many agencies, copies of the transcript are made available at rates established by the agency, although some agencies have provisions for furnishing a copy without charge.<sup>196</sup> Daily copy may be available, but at a substantial premium if the reporting is done by a private company. Pursuant to the Federal Advisory Committee Act, an agency, subject to certain exceptions, may be required to make copies of the transcript available to any person at actual cost of reproduction.<sup>197</sup> In addition, agencies can make copies of transcripts available for inspection at the agency offices.<sup>198</sup>

Since an accurate transcript is essential, the judge should seek to ensure faithful reproduction. With an unfamiliar reporter, it may be desirable to have material read back early in the hearing to determine its accuracy. Before opening the hearing the judge should supply the reporter with the names of the parties and counsel, their physical location in the hearing room, and any other information that will help the reporter identify the participants. The reporter should be stationed where the judge, witnesses, and counsel can be easily heard. The reporter should be told to notify the judge if there is a need to

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<sup>194</sup>See 5 U.S.C. §556(e) (1988).

<sup>195</sup>See 38 CFR §19.170 (1991) (Board of Veteran's Appeals); 40 CFR §24.16 (1991) (EPA, hearings on interim status corrective action orders).

<sup>196</sup>See, e.g., 10 CFR §2.750 (1991) (Nuclear Regulatory Commission: payment may be waived "for good cause"); 20 CFR §416.1565 (1991) (Social Security Administration: in certain SSI proceedings, payment may be waived "for good cause"); 34 CFR §81.18 (1991) (Department of Education, General Education Provisions Act: transcript to be recorded, transcribed, and made available "to the parties upon request at no charge").

<sup>197</sup>See 5 U.S.C. App. 1, §11 (1988). See also Administrative Conference Recommendation 71-6, "Public Participation in Administrative Hearings" CFR §305.71-6 (1991).

<sup>198</sup>See, e.g., 47 CFR §1.202 (FCC)

change tapes, an inability to hear the parties, personal fatigue, or some other difficulty that might interfere with obtaining an accurate transcript. However, the reporter should not interrupt the proceeding except for such reasons.

Upon request and subject to agency rules, counsel may be permitted to record the hearing for personal use, provided the recording is done unobtrusively. However, the transcript is the only official record of the hearing.

## 2. Convening the Hearing

The judge should convene the hearing, announce the title of the case, and, if appropriate, give preliminary instructions concerning decorum, procedure, and hearing hours. The opening should, of course, be adapted to the type of case and the circumstances. When all interested persons are represented by knowledgeable and experienced counsel the opening statement can be brief. But if counsel or interested persons who are not acquainted with the agency's hearing procedure are present, the judge should explain in detail what the case is about and the procedures to be followed.

Appearances should be entered in the same manner as at the prehearing conference.<sup>199</sup> Ideally, any preliminary motions of substance should have been addressed and decided prior to commencement of the actual hearing. However, where this is not feasible, the judge, after appearances are entered, should receive and either dispose of or take under advisement, any preliminary motions. Motions relating to hearing procedures should normally be disposed of immediately.

Each witness should be sworn before testifying.<sup>200</sup> If a person testifies before being sworn, the oath can be modified to cover testimony previously given.

In a case with few witnesses, all or most of whom are present at the opening of the hearing, it sometimes saves time and is more convenient to swear all potential witnesses in a group at the opening of the hearing. If some do not testify, no harm is done. Witnesses not present at the opening of the hearing can be sworn later.

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<sup>199</sup>See text *supra* at notes 93-94.

<sup>200</sup>The following oath or affirmation is sufficient: "Do you solemnly swear (or affirm) that the testimony you are about to give is the truth, the whole truth, and nothing but the truth (so help you God)?"

### 3. Trying the Simple Case

Again, the distinctions between simple and complex cases often are matters of degree. However, such distinctions provide a framework for organizing a discussion.

#### a. Opening Statement

Before the parties present their direct cases the judge should give counsel an opportunity to make an opening statement setting forth the relief requested, a short description of the evidence to be submitted, and a short summary of other relevant matters. The judge may require all statements to be made at the opening of the hearing, or may permit each counsel to make a statement when presenting the direct case. Opening statements should not be subject to questioning except for clarification.

#### b. Direct Presentation

The judge should call upon each party to present its case in a predetermined order. In two-party cases it is customary to call on the party having the affirmative position, if such distinction exists, to present the case first.

The rules of evidence in formal administrative hearings will be examined in more detail later in this Manual. However, for the purpose of discussing the relatively simple case, it should be noted that in many federal administrative proceedings the Federal Rules of Evidence do not apply.<sup>201</sup> However, there are exceptions.<sup>202</sup> Moreover, even if the Federal Rules of Evidence are not applicable by agency rule, they may provide guidance for filling in gaps, and in situations where the judge has discretion in conducting the hearing. For example, when the witness is friendly and there is a question of credibility, it may be advisable for the judge to hark to the rule restricting leading questions.<sup>203</sup>

Some of the procedures for admission of exhibits that are discussed later, in connection with the complex case, may not be applicable in a simple case. Still, reference to that section may be helpful in addressing some of the difficult questions pertaining to the presentation and receipt of evidence. For present purposes, it should be noted that even in a "simple" case the judge should use prehearing conferences or other devices to lay the groundwork for

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<sup>201</sup>See, e.g., 10 CFR §1013.34 (1991) (Department of Energy, Program Fraud Civil Remedies and Procedures).

<sup>202</sup>For one exception, see 29 CFR §2200.71 (1991) (Occupational Safety and Health Review Commission).

<sup>203</sup>Fed. R. Evid. 611.

smooth, professional handling of exhibits and other evidence. Agency rules may provide expressly for exchange of proposed exhibits prior to the hearing or similar procedures.<sup>204</sup> Moreover, when problems of authenticity are involved, and agency rules are not dispositive, the judge may be able to give substantial weight to Federal Rules 901-903.

### c. Cross-examination

In proceedings involving more than two parties, it is frequently advantageous to permit that party who has the most substantial adverse interest to cross-examine first. Otherwise the order of cross-examination may be prearranged at the judge's discretion, perhaps in consultation with the cross-examining parties.

On matters of credibility the judge should be alert to prevent both coaching the witness (indicating the answer desired by a nod or other signal) and the interruption of cross-examination by distracting objections or otherwise. On the one hand, the judge may permit more wandering, illogical, and perhaps less relevant questioning if counsel is in good faith attempting to get information from a recalcitrant or possibly dishonest witness. On the other hand, the judge may find it desirable to let objecting counsel know that frivolous objections are counter-productive, or to defer a recess or to refuse to go off the record. If witnesses are sequestered, it is necessary to prevent witnesses who have not testified from talking to witnesses who have. This can frequently be accomplished by extending the length of the session to avoid overnight or other lengthy recesses. Also, it goes without saying that the judge should be alert to protect a witness and the record, if the witness is unsophisticated, unfamiliar with courtroom procedure, timid, or suffering from any other personal trait or handicap that would make for vulnerability to the questioning of a clever or forceful lawyer. The judge should ensure, as much as possible, that the record reflects the witness' actual observations and viewpoints.

When cross-examination by all adverse parties is concluded, the judge should permit redirect examination on matters brought out on cross-examination.

If there is more than one party in an otherwise simple case, each party in turn should try its case in the manner outlined above except that each party should, during or at the conclusion of its direct presentation, rebut the case of any party that has previously presented its direct case. Each party should be

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<sup>204</sup>See, e.g., 7 CFR §15.113 (1991) (Department of Agriculture: Nondiscrimination); 28 CFR §68.44 (1991) (Department of Justice: Unlawful employment of aliens and related employment practices); 29 CFR §18.50 (1991) (Department of Labor).

permitted to rebut the cases of those parties that followed it in making their direct presentations.

The judge should usually excuse a witness whose testimony is concluded, subject to recall pending later developments at the hearing.

#### d. Miscellaneous

Administrative proceedings conducted under particular statutes, types of regulations, or agency customs may present special problems that call for extra alertness and ingenuity on the part of the judge. For example, in Social Security claims cases the agency is not represented and the claimant often appears without counsel.<sup>205</sup> Although these cases are not normally considered adversary proceedings, they do require a delicate sense of fairness and an extra effort by the judge to ensure that the record is fully developed and that the claimant is fully aware that the judge is treating both the agency and the claimant fairly and impartially. Indeed, courts have remanded cases for further hearing when administrative law judges have not met their special obligations in cases involving unrepresented claimants.<sup>206</sup>

The unrepresented party presents several problems that are more likely to be encountered in the "simple" cases, and the judge often needs a high order of skill to deal with the inexperienced pro se party. For instance, the pro se party may never have been in a hearing room or courtroom before. The judge is sometimes caught between complying with the mandate of reviewing courts--take the unrepresented party's circumstances into consideration--and the

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<sup>205</sup>However, the number of cases where a claimant is represented seems to have increased substantially in the last several years. As of 1992, the rate of claimants represented by an attorney apparently is over 80%. Letter from Acting Chief Administrative Law Judge, dated May 20, 1992, to Morell E. Mullins, revisor of the 1992 edition of this Manual. Moreover, it is not beyond the realm of possibility that the agency may seek, directly by legislation or indirectly by other means, to have legal representation at some hearings. *Cf. Salling v. Bowen*, 641 F. Supp. 1046 (W.D. W. Va. 1986).

<sup>206</sup>The Ninth Circuit has stated that: "When a claimant is not represented by counsel, the administrative law judge has an important duty to scrupulously and conscientiously probe into, inquire of, and explore for all relevant facts and he must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited." *Cruz v. Schweiker*, 645 F.2d 812 (9th Cir. 1981). *See also Sims v. Harris*, 631 F.2d 26 (4th Cir. 1980). A more recent case is one of several that continues to follow a similar philosophy by referring to the ALJ's duty to probe and explore relevant facts if a claimant is unrepresented by counsel and disabled. *Poulin v. Bowen*, 817 F.2d 865 (D.C. Cir., 1987). The heightened duty toward unrepresented claimants was emphasized in a recent case where the Merit Systems Protection Board's Chief ALJ referred to a Social Security Administration ALJ's "special duty to protect the rights of a pro se claimant." *SSA v. Anyel*, Docket No. CB7521910009T1 (MSPB Jan. 16, 1992) (recommended decision of ALJ).

simple fact that the unrepresented party may be difficult to control. This party may present the volatile combination of a weak case and strong feelings about the righteousness of his or her cause. Furthermore, claims cases occasionally involve conflicting claimants with strong personal animosity towards each other. A relatively small amount of benefits sometimes generates more ill-will and hard feelings than larger sums. Also, the judge often must make special efforts to calm witnesses who are frightened or confused, and must be prepared to cope with intemperate outbursts and, perhaps, even physical violence.

In enforcement cases, the problems may be even more acute. The pro se party who is the subject of civil penalty or other proceedings brought by a federal agency, such as the Occupational Safety and Health Administration, may be quite angry. Even worse, the pro se party may have a yen to "play lawyer," but is handicapped by misunderstanding, fostered by the distortions of the popular media, about what lawyers do, and how they do it.

Other problems may arise in the "simple" case, even when a party is represented by counsel. For example, in enforcement cases, there is often a real need for an agency to protect sources of information, to develop evidence from hostile sources, and to prevent possible fabrication of rebuttal testimony. Use of some of the procedural devices previously discussed, such as prehearing discovery, may be modified or curtailed in such agencies, such as the National Labor Relations Board. In cases of this nature, devices similar to some of those described below, such as *in camera* inspection of documents,<sup>207</sup> may be helpful.

#### 4. Trying the Complex Case

In addition to the suggestions set out under *Convening the Hearing and Trying the Simple Case*,<sup>208</sup> there are several techniques that the judge handling a complex case may find useful for developing a relatively concise, but complete and fair record. Applicability will depend on such variables as the type of case, the issues, the number (and possible grouping) of parties, and the place of hearing. Each case requires tailoring. A boiler-plate script or customary format may not be possible or desirable because of the great variety of types of cases heard by administrative law judges in different programs and different agencies.

Nevertheless, the following discussion may be useful for arranging and organizing a hearing in a complex case. This discussion assumes that written

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<sup>207</sup>See text *infra*, at notes 241-247.

<sup>208</sup>See text *supra*, at notes 198-206.

testimony, both direct and rebuttal, has been exchanged a substantial period of time before the hearing commences.<sup>209</sup>

### a. Direct Presentation

In complex cases, the judge by prehearing order (or the agency rules) may have laid the groundwork for introduction of exhibits. If not, it may be desirable to hold a preliminary admissions conference, before the hearing, at which the parties identify their proposed exhibits, objections of opposing counsel are received, and the judge rules on the admissibility of challenged portions.

If written testimony has been exchanged as part of the prehearing development of a case, each party should be called upon in a predetermined order to present its entire case, including all rebuttal evidence. Counsel may be required or permitted to make an opening statement, which is not subject to cross-examination, though the judge and counsel may ask questions.

Normally counsel should present any exhibits for identification, and should specify which exhibits will be sponsored by each witness and the order of presentation. Counsel should then call the first witness whose qualifications should then be established. Counsel should have the witness sponsor the relevant exhibits<sup>210</sup> (if sponsorship is needed) and commence direct examination. Testimony regarding exhibits may be confined primarily to the correction and clarification of exhibits and to matters that have occurred since the exhibits were prepared. Exhibit material should not be summarized, repeated, or read. Following direct examination, counsel should offer the witness' exhibits in evidence before the witness is released for cross-examination.

In the event that cross-examination on any exhibits has been waived, counsel may, following their identification, simply offer them in evidence.<sup>211</sup>

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<sup>209</sup>For examples of agency rules that contemplate exchange of written testimony or summaries, see 14 CFR §302.24(c) (1991) (Department of Transportation, Aviation Proceedings: "Evidence shall be presented in written form by all parties wherever feasible. . . ."); 18 CFR §385.601 (1991) (FERC). For a rule that contemplates that all evidence at the hearing will be in written form unless the presiding officer directs otherwise, see 40 CFR §124.85 (1991) (EPA, evidentiary hearings for EPA-issued NPDES permits and EPA-terminated RCRA permits)

<sup>210</sup>The sponsoring question may be phrased as follows: "Were exhibits \_\_\_\_\_ prepared by you or under your control and supervision, and are they true and correct to the best of your knowledge and belief?"

<sup>211</sup>For examples of agency rules contemplating the prehearing development of questions such as on authenticity, see 7 CFR §15.113 (1991) (Department of Agriculture, Hearings under Civil Rights Act of 1964); 12 CFR §308.33(c) (1991)(FDIC); 24 CFR §2.74 (1991) (HUD); 29 CFR §18.50 (1991) (Department of Labor).

They should be received, subject at any time to any objection other than lack of oral sponsorship.

### b. Receipt of Exhibits

When exhibits are offered, the judge should consider motions to strike. The judge should take careful note of the material objected to and the basis of objection. When all objections have been received, the judge should announce what testimony (not otherwise objected to) is deemed improper, giving reasons. Counsel for the witness should be permitted to reply. The judge should weigh the arguments, perhaps during a short recess, and rule on the admissibility of all challenged portions.

Factual exhibits are sometimes interlaced with argumentative, redundant, and inconsequential material. Rather than take the time to go through the procedures outlined above and to examine the exhibits word by word or line by line to strike such matter, it is frequently quicker, easier, and more satisfactory for the judge to announce that such material will not be considered, and that attempts to cross-examine on it are unnecessary and will be stricken. Unless the exhibit is substantially lacking in relevant material or is so argumentative as to obfuscate the record, opposing counsel will usually acquiesce.

The primary advantage of considering motions to strike at the outset is that it eliminates cross-examination on inadmissible evidence. *Objectionable material*, if admitted, *frequently generates the most cross and redirect examination*. Additional motions to strike may be entertained at any time based on further developments at the hearing.

The reporter should mark each exhibit "Received" or "Rejected" pursuant to the judge's ruling. Ordinarily, excluded material should not be physically removed but should accompany the record with the notation "Rejected". This material is not a part of the record and cannot be considered by the agency except to rule on the validity of its exclusion. Counsel should be directed to delineate stricken portions on all copies of the exhibit submitted for the record.

### c. Cross-examination

Rules concerning cross-examination usually are an important part of the ground rules that are established by the judge at the prehearing conference and included in the conference report.<sup>212</sup> Whether by ground rules or otherwise, the judge should establish that order of cross-examination which will develop the most concise and clear record. This frequently cannot be determined until

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<sup>212</sup>See text *supra*, at notes 98-99, and Appendix I, Form 3, ¶8.

the direct examination has been completed. Ordinarily priority is given to that party likely to have the most extensive cross-examination or who has the greatest interest in the direct testimony.

Unless witness credibility is involved, cross-examination is frequently confined to clarifying the exhibits, determining the source of the material, and testing the basis for the witness' conclusions. As stated previously, one writer has suggested that the major rebuttal of expert opinion testimony should take place not by cross-examination but by submission, prior to the hearing, of rebuttal testimony prepared by the opponent's experts.<sup>213</sup> In any event, when cross-examination with respect to opinion testimony is needed in an attempt to demonstrate inconsistencies or improbabilities, the judge should not let the examination degenerate into mere rhetoric. The judge also may find it helpful to gently remind counsel that there is no jury present.

Cross-examination should be limited to matters covered on direct unless there are special reasons for further questions. A departure may be justified, for example, if a party is seeking to elicit from the witness information that cannot readily be obtained in any other way, or if limiting the testimony would result in the witness being recalled later.

Although usually only those parties adversely affected by a witness' testimony should be permitted to cross-examine, special circumstances may make it appropriate to deviate from this practice. For example, counsel representing a community that favors an application should be permitted to cross-examine an applicant's witnesses if the applicant shows only mild interest in, and makes a weak factual presentation in support of, an application in which the affected community has an important interest.

Generally, counsel should not be permitted to interject questions during cross-examination by other counsel. However, like all general principles, this is subject to exception, especially where counsel is intervening in good faith for the sake of clarification and the clarification would clearly save substantial time.

#### d. Rebuttal Testimony

As previously stated, rebuttal testimony ideally could be included in the party's original presentation, especially where parties had originally exchanged written testimony. However, the ideal is not always possible. For example, agency rules may not allow a judge to require full exchange of written testimony prior to the hearing. Or, the case may be of a type that is not susceptible to that kind of approach. Moreover, additional rebuttal evidence may become available after the hearing begins. If rebuttal evidence later

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<sup>213</sup>See text *supra*, at note 149.

becomes available, or if another party later presents new material that requires some response, additional rebuttal, either oral or written, certainly may be permitted. If the rebuttal is extensive, a short suspension of the hearing or a temporary withdrawal of the witness may be necessary to permit counsel to prepare for cross-examination.

#### e. Redirect

Following cross-examination, redirect should be permitted, confined to matters brought out on cross-examination. A short conference between counsel and his witness may be allowed.

#### f. Multiple Witness Testimony

Sometimes the testimony can be clarified, expedited, and simplified by placing more than one witness on the stand at the same time.<sup>214</sup> A panel of two or more witnesses is called to the stand. Counsel for the witnesses qualifies them individually, and may question them individually or collectively depending on the material covered and the circumstances. Following direct examination the panel may be cross-examined. Questions may be directed to the panel and answered by the witness or witnesses having the pertinent information, or the witnesses may be questioned individually, with counsel choosing the witness to answer the question. The possibilities are numerous. Following cross-examination, the panel may be subjected to redirect examination.

At the former Civil Aeronautics Board the judges used this device for many years.<sup>215</sup> Technical information was presented by a panel of two or more witnesses, each qualified on a different aspect of the evidence. Cross-examining counsel, uncertain about whom to direct a particular question to, would ask the question, and the witness having the pertinent information would answer. This procedure proved quicker and made a cleaner record than examining the witnesses seriatim with the frequent necessity of repeating previously unanswered questions and for recalling an earlier witness.

Similar procedures have been used by the Department of Labor, with panels of as many as eleven witnesses, and by the Federal Energy Regulatory

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<sup>214</sup>P. Nejelski and K. Shuart, *Trial Balloon--Is Multiple Witness Testimony Worth a Try?*, 7 LITIGATION MAGAZINE 3 (Winter 1981).

<sup>215</sup>Ruhlen, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 47 (Administrative Conference, 1982).

Commission, which used panels of witnesses for technical cases involving rates and licensing,<sup>216</sup> and the Nuclear Regulatory Commission.<sup>217</sup>

Although testimony by multiple witnesses can be used to advantage in many types of cases and circumstances, it would seem particularly adapted to cases involving cross-examination on highly technical evidence submitted before the hearing in written form where there is no substantial question of credibility of witnesses. Multiple witness testimony may also be used to advantage when it is necessary to have several witnesses testify as to a procedure in which they all participated or when the operation of a technical piece of equipment can best be explained by two or more experts. The feasibility and benefits of using this procedure will frequently depend on the ingenuity and resourcefulness of the judge and counsel.

The mechanics of eliciting such testimony are simple. Usually, two or more witnesses would be seated where they could be observed by the reporter, the judge, and counsel. Counsel directs questions to one or more specific witnesses or to the panel as preferred, or as previously arranged. Each counsel cross-examines in the agreed-upon order. The procedure can be changed according to circumstances so long as it deprives no party of substantive rights.

Nevertheless, problems may arise with the use of multiple witness panels. Some of those problems can best be resolved at a prehearing conference or at a conference during the course of the hearing, where the judge and counsel can arrange for the specific questions to be considered and the procedures to be followed. For example, they may agree as to whether questions are to be directed to the panel as a whole or to individual witnesses. Furthermore, whether this procedure will be used or permitted may affect how testimony is to be prepared. The judge should also be alert to possible confusion if two or more witnesses start talking at the same time, if the witnesses start arguing, or if it is not clear what the question is or which witness is qualified to answer it.

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<sup>216</sup>P. Nejkski and K. Shuart, *supra* note 213, at 3. In a telephone conversation with Morell E. Mullins, revisor for the 1993 edition of this Manual, FERC Chief Administrative Judge Curtis Wagner reported that he still uses this technique.

<sup>217</sup>Telephone conversation, March 26, 1992, between Judge Ivan Smith, Nuclear Regulatory Commission, and Morell E. Mullins, principal revisor, 1993 edition of this Manual. Judge Smith indicated that he had used the multiple witness technique in the 3-Mile Island case. For some reported NRC cases that refer to witness panels, see *In the Matter of Public Service Company of New Hampshire, et al. (Seabrook Station, Units 1 and 2)*, 30 NRC 331, 1989 NRC Lexis 69 (Docket Nos. 50-443-OL; 50-444-OL (Offsite Emergency Planning Issues, 1989); *In the Matter of Florida Power and Light Co. (Turkey Point Plant, Units 3 & 4)*, 27 NRC 387, 1988 NRC Lexis 29 (Docket Nos. 50-250-OLA-2, 50-251-OLA-2, ASLBP No. 84-504-07-LA (Spent Fuel Pool Expansion), LBP-88-9A (1988)).

Another problem is that indexing the transcript by witness or subject may become more difficult.

Obviously, multiple witness testimony may not be feasible or desirable in many situations. For example, it may have little, if any, use when credibility of witnesses is at issue, when witnesses are sequestered, or the factual questions are to be covered by only one witness.

However, we are so accustomed to the seriatim testimony of one witness after another that we may have neglected too long a device which holds considerable potential for the complex case involving high tech factual disputes. The use of multiple witness testimony or panels, on its face, seems quite compatible with due process and could enhance the truth-finding function of the judge. At least some agencies by rule explicitly allow multiple witness testimony or panels.<sup>218</sup>

#### g. Questions by the Judge

The judge certainly may question a witness if there is good reason to do so. However, the judge should be very circumspect in exercising this power. Prudence should be the judge's watchword. For example, the judge ordinarily should not question a witness initially, before the parties have their opportunity to ask their own questions. However, on rare occasions, a judge might do so if it seems absolutely necessary for such purposes as: (1) preventing reversible error; (2) protecting the record against the inclusion of seriously misleading, obfuscating, or confusing testimony; or (3) avoiding serious waste of time by forestalling extensive, useless, or irrelevant examination by counsel who is incompetent, or worse. Within reason, and with due regard for the need to maintain both the fact and appearance of impartiality, the judge also may need to interrupt when the witness and counsel are at cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when for some other reason assistance is needed to ensure orderly development of the subject matter. At the close of cross-examination or redirect, the judge may question the witness to clarify any confusing or ambiguous testimony or to develop additional facts. When the testimony of the parties' experts is inconclusive, or when no expert witnesses are presented, the judge sometimes may find it necessary to call an expert as

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<sup>218</sup>10 CFR §110.107(f) (1991) (NRC, Export & Import of nuclear equipment and material: "Participants and witnesses will be questioned orally or in writing and only by the presiding officer. Questions may be addressed to individuals or to panels of participants or witnesses."); 40 CFR §124.85 (1991) (EPA, evidentiary hearings for EPA-issued NPDES permits and EPA-terminated RCRA permits: authorizing hearing officer to "[p]rovide for the testimony of opposing witnesses to be heard simultaneously or for such witnesses to meet outside the hearing to resolve or isolate issues or conflicts.").

the tribunal's own witness.<sup>219</sup> Indeed, the judge is not necessarily limited to calling expert witnesses. Where necessary, and subject to any agency or statutory constraints, the judge usually can call witnesses or adduce evidence on any crucial issue.<sup>220</sup>

#### h. Closing the Presentation

When written evidence has been exchanged before the hearing, all of a party's witnesses, including rebuttal witnesses, should normally be called and examined before the witnesses for the next party are called. When testimony is completed, a witness should be excused subject to recall at the judge's discretion, unless the parties and the judge agree that it is unnecessary.

### 5. Rules of Evidence

Few legal concepts have become more deeply entrenched than the postulate that the strict common law rules of evidence do not apply, by their own force, to administrative proceedings. The reasons for this are fairly plain. To the extent that traditional common law rules of evidence were developed to insulate jurors from certain kinds of information, they are not very relevant to the administrative proceeding, where there is no jury. Even before the APA, the inapplicability of the strict rules of evidence was well-established. For instance, Judge Learned Hand, in an opinion regarding the admission of hearsay in an NLRB proceeding, had approved a less rigorous standard, referring to "the kind of evidence on which responsible people are accustomed to rely in serious affairs."<sup>221</sup>

However, this does not necessarily mean that the rules of evidence prevailing in the courts can never be applied in agency proceedings. As usual, much depends on the organic statute governing the agency, and the agency's own rules. Statutorily, Congress may require an agency to apply nearly any set of evidentiary rules. The statutory provisions governing unfair labor practice hearings before the NLRB, for instance, require that those proceedings, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil

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<sup>219</sup>Form 11 in Appendix I is a sample request for an expert to serve as a judge's witness. See also Federal Administrative Judiciary, *supra* note 4, at 82-83.

<sup>220</sup>See, e.g., 29 CFR §2200.67(j) (1991) (Occupational Safety and Health Review Commission: authorizing ALJ to "[c]all and examine witnesses and to introduce into the record documentary or other evidence").

<sup>221</sup>*NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir. 1938), *cert. den.*, 304 U.S. 576 (1938).

procedure for the district courts of the United States."<sup>222</sup> The variations are numerous. For example, one agency provides that the Federal Rules of Evidence (FRE) will be employed as general guidelines, but that all relevant and material evidence shall be received.<sup>223</sup> Another provides that the FRE shall apply unless provided otherwise by statute, and, in addition, that the presiding officer may relax the rules if the ends of justice require it.<sup>224</sup>

Still, the APA provides something of a guide, or statutory norm: any oral or documentary evidence may be received, but the agency as a matter of policy must provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.<sup>225</sup> Many agencies include provisions similar to the APA in their Rules of Practice.<sup>226</sup> However, some follow a different drummer and do apply the Federal Rules of Evidence.<sup>227</sup>

At any rate, the Federal Rules of Evidence are not controlling in administrative proceedings unless made so by statute or agency rule.<sup>228</sup> It is worthwhile, however, for the judge to be familiar with these rules. They can furnish guidance and insights that can help resolve evidentiary problems.

While technical rules of evidence are less important in administrative proceedings than in jury trials, sound judgment concerning the probative value of proffered evidence is crucial. Relaxed rules of evidence may lull counsel into sloppiness, or deliberate tactics aimed at clouding the record with chaff.

<sup>222</sup>29 U.S.C. §160(b) (1988).

<sup>223</sup>49 CFR §209.15 (1991) (Department of Transportation, Federal Railroad Administration, Railroad Safety Enforcement Proceedings). For an NRC case, see *Duke Power Co.*, 15 NRC 453, 475 (1982) (FRE not directly applicable, but Commission looks to them for guidance).

<sup>224</sup>16 CFR §1025.43 (1991) (Consumer Product Safety Commission, Rules of Practice for Administrative Law Judges).

<sup>225</sup>U.S.C. §556(d) (1988).

<sup>226</sup>*See, e.g.*, 10 CFR §2.743 (1991) 13 CFR §134.28(b) (1992) (SBA); 16 CFR §3.43(b) (1991) (FTC); 18 CFR §385.509 (1992) (FERC); 43 CFR §4.435 (1991) (Department of the Interior); 45 CFR §81.78 (1991) (Department of Health & Human Services, Part 80 proceedings).

<sup>227</sup>*See* 29 CFR §2200.71 (1991) (Occupational Safety and Health Review Commission). The Consumer Product Safety Commission also makes the Federal Rules applicable, but with loopholes. "Unless otherwise provided by statute or these rules, the Federal Rules of Evidence shall apply to all proceedings held pursuant to these Rules. However, the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will better served by so doing." 16 CFR §1025.43(a) (1991) (rules of practice for adjudicative proceedings).

<sup>228</sup>For a significant article on the Federal Rules of Evidence and administrative law, see *Pierce, Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987). For a relevant Administrative Conference Recommendation, see ACUS Recommendation 86-2, "Use of the Federal Rules of Evidence in Agency Adjudications," 1 CFR §305.86-2 (1992).

The judge must remain alert, and should strike, upon objection or upon motion of the bench, evidence so confusing, misleading, prejudicial, time wasting, repetitious, or cumulative that its pernicious influence outweighs its probative value. *Marginally relevant evidence is not merely useless; it is positively harmful because it inflates the record which the parties, the judge, and the agency must examine.*<sup>229</sup>

#### a. Hearsay

Any rigid rule about hearsay is unsuited to the varied inquiries conducted by administrative agencies. Unless statute or agency rule dictates otherwise, hearsay should be admitted if it appears reliable and is not otherwise improper. It should be admitted if the nature of the information and the state of the particular record persuade the judge that it is useful.<sup>230</sup>

#### b. Best Evidence

Counsel sometimes offer a copy of a document without a proffer of the original. The accuracy and authenticity of the document may be assumed unless questioned. The agency rules<sup>231</sup> or the procedural ground rules adopted by the judge<sup>232</sup> may provide that the authenticity of proffered documents shall be deemed admitted unless written objections are filed within a specified time. The prehearing proceedings will frequently produce stipulations concerning the principal documents at issue and the facts they contain.

### 6. Offers of Proof

When documents offered in evidence are rejected they may, if requested by counsel, serve as offers of proof of the facts stated. When an objection to the receipt of oral testimony is sustained, counsel should be permitted, as an offer of proof, to state orally the substance of the evidence to be offered; or if the offer is lengthy, the judge may require a written submission.<sup>233</sup>

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<sup>229</sup>See *Union Stockyard Co. v. United States*, 308 U.S. 213, 223-24 (1939); *United States v. Bowe*, 360 F.2d 1, 7 (2d Cir. 1966), *cert. denied*, 385 U.S. 961 (1966); *Fed. R. Evid.* 401-403; and *Gardner, Shrinking the Big Case*, 16 *ADMIN. L. REV.* 5 (1963).

<sup>230</sup>See *Richardson v. Perales*, 402 U.S. 389 (1971).

<sup>231</sup>See, e.g., 16 CFR §3.32(b) (1992) (FTC); 28 CFR §68.19(b) (1991) (Department of Justice); 47 CFR §1.246 (1991) (FCC).

<sup>232</sup>See text at note 98, *supra*, and Appendix 1, Form 3, ¶4.

<sup>233</sup>For some examples of agency rules dealing with offers of proof, see 7 CFR §1.141 (1991) (Department of Agriculture); 13 CFR §134.28 (1991) (Small Business Administration); 14 CFR §13.225 (1991) (FAA).

Counsel may argue that permitting a rejected exhibit to accompany the record as an offer of proof will not save any time unless cross-examination is permitted. Nevertheless, cross-examination on an offer of proof should not be allowed--absent agency rules or other overriding mandates--because it would defeat the purpose of the exclusion.

## 7. Constitutional Privileges: Self-Incriminating Testimony, Search and Seizure, and Suppression of Evidence

Privileges available in litigation generally, whether derived from the Constitution or case law or practice, are applicable to testimony in administrative proceedings. However, there are at least two important refinements that should be noted in this regard. First, the privilege against self-incrimination is personal and testimonial in nature, so ordinarily it does not apply to corporations,<sup>234</sup> other entities,<sup>235</sup> or business records.<sup>236</sup> Second, failure to assert this protection constitutes a waiver.<sup>237</sup>

In addition, there are procedures under which a witness can be granted immunity and required to testify. Once a witness has claimed the privilege, the judge should refer any request to compel the witness to testify to the agency for determination pursuant to the relevant statute.<sup>238</sup>

The agency may, with the approval of the Attorney General, issue an order requiring an individual to provide testimony or other information that is withheld on the basis of the privilege against self-incrimination, but only if the agency concludes that the testimony or other information from the individual may be necessary to the public interest and that the individual has refused or is likely to refuse to testify or provide such information. If such an order is issued, the individual is immunized from any criminal prosecution based on his testimony or information.<sup>239</sup>

Application of the Fourth Amendment's provisions regarding search and seizure can be quite complex, even abstruse. Some issues, such as the agency's basic authority to inspect commercial premises without a warrant, are

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<sup>234</sup>U.S. v. White, 322 U.S. 694, 699 (1944).

<sup>235</sup>See *Bellis v. U.S.*, 417 U.S. 85 (1974); *U.S. v. Greenleaf*, 546 F.2d 123 (5th Cir. 1977).

<sup>236</sup>*Shapiro v. U.S.*, 335 U.S. 1 (1948). *But see* *Marchetti v. U.S.*, 390 U.S. 39 (1968).

<sup>237</sup>*United States v. Kordel*, 397 U.S. 1, 10 (1970).

<sup>238</sup>See 18 U.S.C. §§6001-6005 (1988).

<sup>239</sup>18 U.S.C. §§6002, 6004 (1988). For some agency rules regarding this process, see 14 CFR §13.119 (1991) (FAA); 16 CFR §3.39 (1991) (FTC); 16 CFR §1025.39 (1991) (Consumer Product Safety Commission).

likely to be heard in the judicial branch.<sup>240</sup> The administrative law judge perhaps is most likely to encounter Fourth Amendment issues in the context of efforts to exclude or suppress evidence allegedly obtained illegally, in violation of this, or other, constitutional rights. Thus far, the key Supreme Court decision is *INS v. Lopez-Mendoza*<sup>241</sup>, which candidly resorts to balancing the likely social benefits of excluding unlawfully seized evidence against the likely costs of excluding it.

## 8. Argument on Motions and Objections

The judge may permit oral argument in support of or in opposition to motions and objections. If desired, and not unduly delaying, the judge may request written memoranda upon disputed points. Whether or not oral argument is requested, exceptions to unfavorable rulings should be deemed automatic; there is no need for a constant chorus of "Exception" from counsel to preserve counsel's exceptions.

## 9. Confidential Information

### a. Methods of Handling Confidential Material

When it is desirable to prevent competitors from obtaining information about specific trade relationships, it is sometimes possible to substitute symbols for names and to receive the information at the public hearing. When similar statements or reports from several individuals are involved, counsel may agree to identify, and cross-examine on, a number of representative reports and to receive the others without cross-examination and with no public identification other than symbols.<sup>242</sup> Alternatively, the parties may agree to submit data on a confidential basis to a neutral expert for preparation of summaries or averages. It is sometimes desirable to hold separate *in camera* sessions for different parties, with competitors excluded from each session. This may require the consent of the parties involved.

When it is desirable to have an advance written exchange of confidential material, the judge should develop appropriate safeguards to ensure confidentiality. The judge may, for example, obtain the commitment of the parties receiving the material to limit its distribution to specific persons; or ask

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<sup>240</sup>*See, e.g.*, *New York v. Burger*, 482 U.S. 691 (1987); *Dow Chemical Co. v. U.S.*, 476 U.S. 227 (1986); *Donovan v. Dewey*, 452 U.S. 594 (1981); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

<sup>241</sup>468 U.S. 1032 (1984).

<sup>242</sup>*Cf.* *North Atlantic Tourist Commission*, 16 CAB 225, 227, 228, 234, 235 (1952).

unaffected parties to waive the receipt of certain material. All copies of such material should bear a prominent legend stating the limitations upon its distribution pursuant to the order of the judge.

In some agencies, such as the FCC or FTC, confidential information, particularly material claimed to be proprietary information or trade secrets, may be handled by procedures contained in a protective order issued by the judge.<sup>243</sup> Such an order often is issued during prehearing discovery, as a result of a party's refusal to release material to an adversary party, an intervenor, or the agency staff without provision for confidential treatment. The request for the order is usually grounded on the claim that unrestricted release of the material may result in its misuse, such as unfairly benefiting competitors. To guard against misuse of the information, the order should provide the terms and conditions for the release of the material. It should also contain an agreement to be signed by users of the material, and may include procedures for handling the material if offered in evidence, including, for example, prior notification to the party submitting the material of the intention to offer it as evidence, and provisions for sealing the pertinent portions of the record, briefs, and decisions.<sup>244</sup> In some situations the judge may find it easier to allow the parties to draft a proposed order for the judge's consideration.

The judge must recognize that the use of protective order procedures could be inimical to the concept of a public hearing. Consequently, extreme care must be exercised in the issuance and application of the order to ensure that the integrity of the record is preserved and the rights of the parties and the public are given due consideration.

At the hearing, if material covered by the prehearing order is offered in evidence, the judge must decide whether the material should be admitted, rejected, or admitted with special protection.<sup>245</sup> To do this, the judge should examine the material, hear arguments, and make rulings *in camera*. If the judge rules that the material is not covered by the order and a request to appeal the ruling is made, the request should usually be granted, if interlocutory appeal on this issue is permitted by agency rules. Further action with respect to the material then would be deferred until the appeal is decided.

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<sup>243</sup>See, e.g., *Exxon Corp. v. Federal Trade Commission*, 665 F.2d 1274 (D.C. Cir. 1981). Some examples of agency rules pertaining to protective orders include: 10 CFR §205.66 (1991) (Department of Energy); 15 CFR §25.24 (1991) (Department of Commerce, Program Civil Fraud Remedies); 16 CFR §3.31(c) (1991) (FTC); 16 CFR §1025.31(d) (1991) (Consumer Product Safety Commission); 18 CFR §385.410 (1991) (FERC); 29 CFR §18.15, 18.46 (1991) (Department of Labor).

<sup>244</sup>Forms 19-a to -d in Appendix I are sample protective orders.

<sup>245</sup>See 16 CFR §3.45 (1992) (FTC); 49 CFR §511.45 (1991) (DOT, National Highway Traffic Safety Administration).

### b. *In Camera* or Closed Sessions<sup>246</sup>

Hopefully, any issues involving confidential, privileged, or similar matter will have been raised and resolved during the prehearing stage of a case. However, much of what is discussed here would apply equally to handling the problems of confidential material during discovery and other prehearing proceedings.

By specific rule or under the general authority to regulate the course and conduct of the hearing, a judge not only may consider documents *in camera*, but also may hold *in camera* (i.e., closed) sessions to receive confidential material. Closed sessions or *in camera* proceedings should be discouraged because they often create serious practical problems in the conduct of the hearing, in the preparation of briefs, and upon administrative and judicial review. However, they may prove unavoidable from time to time, especially in agencies that regularly deal with sensitive governmental, technical, or commercial information.

An *in camera* session is a part of the formal proceeding, but the testimony, documents, and exhibits received are not included in the public record.<sup>247</sup> This permits confidential receipt of evidence that frequently consists of "matters required by Executive Order to be kept secret in the interest of the national defense or foreign policy" or "trade secrets and commercial or financial information."<sup>248</sup>

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<sup>246</sup>The 1982 edition of this Manual used the term "executive session" to refer to those parts of an administrative hearing closed by the judge, in order to consider confidential material and similar matters. However, trolling through the CFR and Lexis, the present revisor noticed a strong tendency for the term "executive session" to be used mainly in the context of nonpublic proceedings of the agency or board itself. See, e.g., 4 CFR §305.6 (1991) (Cost Accounting Standards Board, GAO); 48 CFR §9901.311 (1991) (Cost Accounting Standards Board, OMB). A Lexis search for "executive session" disclosed the use of that term in connection with ALJs or other hearing officers mainly in a few EPA regulations, such as 40 CFR §85.1807(n)(3) (1991) (referring, apparently indiscriminately, to both *in camera* testimony and executive session); 40 CFR §86.614-84 (1991). The more commonly used term in the CFR seems to be "in camera." See, e.g., 15 CFR §788.11(d) (1991) (Department of Commerce, Bureau of Export Administration: "In camera proceedings"); 13 CFR §121.1717(b) (1991) (SBA: "In camera treatment of documents and testimony"); 16 CFR §3.45(b) (1991) (FTC); 16 CFR §1025.45 (1991) (Consumer Product Safety Commission); 40 CFR §86.614-84(n)(2)(ii) (1991) (EPA: referring to "in camera proceeding"). Accordingly, for whatever difference it may make, the term "executive session" will not be used here.

<sup>247</sup>See, e.g., 13 CFR §121.1717(d) (1991) (SBA); 16 CFR §3.45(b),(c) (1991) (FTC); 19 CFR §210.44 (1991) (International Trade Commission).

<sup>248</sup>5 U.S.C. §§552(b)(1), (4) (1988). This section is usually referred to as the Freedom of Information Act (FOIA). An *in camera* session is not required merely because evidence arguably within FOIA may be involved. However, agency hearing rules regarding material or evidence

Subject to agency rules, an *in camera* session may be held when a witness, an attorney representing a party, or any other person objects to the public disclosure of any privileged or confidential information. Before granting an *in camera* session the judge should be sure that the evidence in question qualifies for protection pursuant to agency rule or statute. If the information to be received is classified, the judge should determine whether he or she and all of the participants have the required security clearance.

An *in camera* or closed session is justifiable only when the law or orderly development of the record and the needs of the parties require it. When this occurs during the hearing, the judge should announce that the public session is in recess, that an *in camera* or closed session will be held, and, if possible, that the public session will resume at a stated time. If the session is to be conducted at the end of the hearing, the judge should announce that the public session is closed and that an *in camera* or closed session will follow.

The *in camera* session should be attended only by the judge, the official stenographer, and such representatives of parties or interested persons as the judge designates, or the agency rules may require. The names of all persons present must be recorded by the official stenographer. After the hearing room is cleared of all others, the session may be opened as follows:

This is an *in camera* [or closed] session. I direct the reporter to keep the transcript of this session confidential until released by the agency; to record the names of the persons present and the fact that they were sworn to secrecy; to make only one transcription of the proceedings and immediately thereafter to place the typed record, together with the stenographic notes and any papers or exhibits received in evidence, in an envelope; to seal the envelope and deliver it to me (or such other agency official as is appropriate).

Before proceeding the judge should administer an oath or affirmation such as the following to *all* persons present, including himself:

Do you solemnly swear (or affirm) that you will hold secret and will not divulge in any manner whatsoever to any person any of the evidence or information which is adduced at this session until such time as the agency may by order indicate that the public interest does not require the continued withholding of such evidence or information, (so help you God)?

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taken *in camera* sometimes overlap, or are coordinated with, FOIA-type disclosure rules. *See, e.g.,* 14 CFR §302.39(a), (c)(1991) (DOT, FAA), and 49 CFR §7.57 (DOT).

When the reason for secrecy is the desire to withhold information for competitive purposes and not national defense, the parties may modify their agreement about confidentiality in any manner they choose.

## 10. Supplemental Data

During the hearing counsel may request or the judge may require supplemental information. The judge may direct its submission during or after the close of the hearing. If submitted during the hearing, unless stipulated, a sponsoring witness should be made available. If it is to be submitted after the close of the hearing, the judge should establish the date for submission, request a waiver of cross-examination, and set the date for filing objections. Even if waiver of cross-examination cannot be obtained in advance, it may be obtained after the parties have received the supplemental material. Otherwise it may be the basis for an objection. The judge should identify, by mark or otherwise, the information submitted and rule on all objections.

If the basis of an objection is the need for cross-examination, it should be accompanied by a statement of the specific purposes of such questioning. If it does not appear that cross-examination is "required for a full and true disclosure of the facts,"<sup>249</sup> or if the material is in any event subject to official notice, the objection should be overruled. Relevant statutory provisions and agency rules governing official notice must, of course, be followed. If the supplemental information is necessary and cross-examination is required, the judge should reconvene the hearing.

Sometimes the parties may stipulate that certain reports or other documents (such as production, income, or cost data), whether or not regularly scheduled, will be received in evidence when released, up to an agreed-upon time no later than final agency decision.

## 11. Mechanical Handling of Exhibits

As each exhibit is introduced, the reporter should be supplied with the number of copies specified in the rules (usually two). The judge should be supplied with one copy. All copies submitted must be legible. If corrections are required later, all copies should be manually corrected by the party submitting them or revised copies should be submitted. The reporter should transmit the exhibits to the agency's docket section with the pertinent parts of the transcript. Similarly, when material is submitted directly to the judge, the judge should ensure that it is also transmitted to the docket section for inclusion in the agency record.

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<sup>249</sup>5 U.S.C. §556(d) (1988).

When sufficient copies of an exhibit are not available at the hearing, the original may be consigned to counsel with the understanding that it will be reproduced and returned to the judge, with copies to all parties. This action should be reflected on the record.

## C. Concluding the Hearing

### 1. Oral Argument

Subject to agency rules, the judge either by direction or on request may permit or require oral argument on the merits of the entire case, or on specific issues, at the close of the hearing or at such other time as may be directed.

The Administrative Procedure Act requires that parties be afforded a reasonable opportunity to submit proposed findings and conclusions to the judge.<sup>250</sup> Although the APA does not require that they be in writing, this is customary, and may be required by agency rules. The judge who wishes to substitute oral argument for briefs should tell the parties at the earliest opportunity, preferably before convening the hearing. If that is not feasible, the judge may permit a short recess at the close of the hearing to give the parties time to prepare oral argument. The latter procedure may be inconvenient and may offer no advantages over written briefs if the argument is not made the day the hearing ends.

### 2. Conferences

At the close of the hearing, after the parties have presented their cases and heard the testimony of all parties, they may find it advantageous to settle some or all of the substantive issues, or to enter into procedural stipulations. If requested, or if the judge believes that it might eliminate, expedite, or simplify some procedural steps, a conference to consider such matters may be suggested or ordered.

### 3. Briefs

Subject to agency rules, the judge should establish dates for submission of briefs. The judge may also authorize reply briefs. Briefs should conform in length and form to agency rule and to the judge's instructions. They should contain precise citations to the record and to the authorities relied upon. Counsel are sometimes careless about citation form, referring to cases without

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<sup>250</sup>5 U.S.C. §557(c) (1988).

adequate identification. The judge may avoid this by requiring reasonable adherence to the *Uniform System of Citation*<sup>251</sup> or any other standard citation system. The judge should require a table of authorities and, if the brief exceeds a stated number of pages, a table of contents or an index. The judge may require research on legal or technical issues and may require the parties to brief specific issues.<sup>252</sup>

#### 4. Notice of Subsequent Procedural Steps

The judge should insure that all parties and interested persons who appeared at the hearing are notified of the dates fixed for submission of briefs and for other procedural steps.

#### 5. Closing the Record

After receipt of all supplemental data the judge may announce by order the closing of the record. For extraordinary reasons, such as newly discovered evidence, and subject to agency rules, the record may be reopened for additional hearing or to stipulate additional material.

#### 6. Correcting the Transcript

If the agency rules prescribe no procedure for correcting prejudicial errors in the transcript, the judge should set them. These should specify the period of time after receipt of the transcript during which changes may be requested. Requests in writing should be made to the judge, with copies to all parties, and should set forth the specific changes desired. If no objections are received within a specified time, and if the judge does not find the proposed corrections inaccurate, the transcript should be corrected accordingly. If any party or the judge does object to the proposed correction, it should be submitted to the official reporter for comparison with the stenographic record. After receipt of the reporter's reply the judge should rule on the request.<sup>253</sup>

The judge should propose corrections if substantial errors are discovered. All parties should be notified of the changes proposed and advised that unless objections are received within a specified time the record will be corrected accordingly.

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<sup>251</sup>A Uniform System of Citation (15th ed. 1991).

<sup>252</sup>Form 12 in Appendix I is a sample request for the briefing of certain issues.

<sup>253</sup>Form 13 in Appendix I is a sample order correcting the transcript when the motion to correct is opposed.

## D. Retention of Case Files

The judge's personal case files should not be destroyed after issuing the decision. Copies of official documents should be retained until the case is finally resolved, either by action of the agency or the courts. Either may remand the case to the judge for further hearing, reconsideration, or both. It will be inconvenient if the judge's own record has been destroyed, and may make the task of reconstructing the record extremely difficult if any part of the agency record has been misplaced, damaged, or lost.

## VI. Techniques of Presiding

As to those aspects of technique touching on matters purely of style, this or any other general Manual will be of limited value. There probably is no single "right" personal style, when it comes to presiding over a case. Every judge has, and develops, an individual style of presiding.

Judges--like managers, mediators, and other professionals whose job is to exert control over a situation--can differ in basic personal style and still be effective. A judge can be extroverted or introverted, aggressive or diffident, pragmatic or idealistic, empathetic or detached, formal or informal, gregarious or reserved. Every judge has a personal temperament shaped by years of experience, and that temperament does not change instantly upon appointment as an administrative law judge. The most important personal quality relative to presiding is probably the capacity for insight or introspection into one's own basic temperament. This is a necessary precondition to learning how to control any personal quirks or characteristics--such as a quick temper at one extreme, or timidity at the other--which might detract from judicial professionalism.

As to other aspects of judging, the proper techniques and methods of presiding depend upon the nature of the case, the number and character of the parties, the issues, the personality of the judge and counsel, and many other variables. Methods and procedures helpful to one judge may be detrimental to another; techniques fair and reasonable in one situation may be arbitrary and inequitable in another. Nevertheless, over the years, administrative law judges have developed certain approaches, customs, and practices that help develop a fair and adequate record in minimal time.

### A. Preparation and Concentration

*The judge must know the case.* It is forgivable for a judge to be less than brilliant and even imperfect. It is not forgivable for a judge to be unprepared.

Before opening the hearing the judge should study the pleadings, the evidence, the prehearing filings, and the trial briefs. The judge also should analyze any anticipated legal, policy, or procedural problems. The experience of fellow judges can be a source of general information and advice.

At the opening of the hearing--and at other times during the proceedings--if the judge needs to make a lengthy statement, the statement should, whenever possible, be prepared in advance and read into the record. It is more likely to be accurate, and it will be easier to understand.

On a par with preparation is *concentration*. It is easy to suffer lapses in this department. Fortunately for judges, a lapse in concentration may not be quite as fatal as it could be for a trial lawyer whose inattention results in failure to make timely objection or in a waiver of the client's rights. However, the judge still must concentrate. During the hearing the judge should follow the testimony closely, not only to prepare for writing a decision, but to keep the hearing on course.

In a related vein, it is wise to skim the previous day's notes, exhibits, and transcript before convening the hearing each day. This procedure has dual benefits. The judge who is fully familiar with the case and the record will be better equipped to exclude unnecessary questions and testimony and keep the hearing moving; it will be easier to rule promptly. Furthermore, notes made concurrently with the transcript may be of incalculable value when searching the record while drafting the decision.

## B. Judicial Attitude, Demeanor, and Behavior

The judge should be in control, but considerate of counsel, witnesses, and others in attendance. Each witness should be called by name and thanked when excused from the stand. Informal reprimands when necessary should ordinarily be delivered privately during recesses or otherwise off the record; they should be entirely avoided if possible.

*The judge should not argue with counsel.* The judge should listen to counsel's point at reasonable length, make a ruling, and proceed. If counsel continues to argue about the ruling, the judge should tell him to proceed with the examination or use any other courteous admonition to close the discussion.

Judicial authority and trial behavior terminate as soon as a recess or an adjournment is announced. If counsel have been recalcitrant, evasive, or even antagonistic, the judge should harbor no resentment upon leaving the bench. One who bears a grudge cannot preside effectively.

The experience, training, and background of participants should always be considered. If an experienced or professional witness is verbose, evasive, or irrelevant, the judge should either stop the testimony or lead it back to relevant

territory. When there is any question of a witness' veracity or forthrightness, cross-examining counsel should be permitted maximum latitude.

However, a witness may be comparatively inexperienced, unacquainted with judicial procedures, frightened, or nervous. The judge should tactfully put such witnesses at ease, protect them from improper questioning of counsel, interrupt when necessary to simplify or clarify questions, permit a certain amount of wandering and meandering testimony, and review with the witness any testimony that has become confused.

### C. Controlling the Hearing

The judge must control the hearing. As soon as the subject under inquiry is exhausted or fully developed, the judge should stop counsel or the witness and direct him to go to other matters. If a question or an answer is irrelevant or improper, the judge should strike it without necessarily waiting for an objection.

On the other hand, if counsel is usefully developing a significant matter, the judge should let him proceed regardless of tedium or ennui. Every veteran judge ruefully recalls searching the record for an important item, only to discover that at the hearing a question seeking that information had been prohibited.

Prompt rulings are essential. If sure about the ruling, the judge should limit argument. If the proponent's argument is not persuasive, the judge should deny the motion or objection without hearing opposing counsel. In multiparty cases, the judge ordinarily should hear argument from only one counsel on each side and should rarely permit rebuttal. If the reason for a ruling is obvious the judge need not waste time explaining. If the issue is more doubtful, reasons should be stated.

A judge should correct an unsound ruling. If, however, making the correction will cause great inconvenience, such as substantial repetition of testimony, the judge should consider whether the error was so prejudicial as to justify such a burden or whether it might be rendered harmless in some other fashion.<sup>254</sup> Counsel will often cooperate in working out a satisfactory solution.

Sometimes counsel will repeat the same line of questioning when inquiring into similar factual situations. The judge may shorten this type of examination by questioning the witness as follows: "If counsel asked you the same questions with reference to your testimony on B, C, and D as were asked with reference to A, would your answers be the same?"

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<sup>254</sup>See 5 U.S.C. §706 (1988) (mentioning that, on judicial review, due account shall be taken of the rule of prejudicial error).

Occasionally one party or a group with the same interests will have several counsel in attendance. The judge normally should allow only one counsel to examine each witness and require the judge's permission before co-counsel may take over the examination. In appropriate circumstances, the judge may insist that only lead counsel state the position of the group.

Although the judge should expedite the hearing and prevent unnecessary testimony, arbitrary time limits should be avoided: for example, allotting counsel 1 day to present the case or 30 minutes for cross-examination. It is seldom possible to determine in advance how much time will be needed, and an arbitrary cutoff can be seriously prejudicial. The object is to make the hearing as short as the subject requires--not to fit it into a predetermined timeframe.

Although the record will presumably be cleaner and easier to understand if the planned order of presentation is strictly followed, circumstances such as the illness or unforeseen unavailability or serious inconvenience of a witness often interfere. Rather than adjourning the hearing until the witness is available, it is usually preferable to rearrange the schedule after informal discussions with counsel. Similarly, if *essential* material is offered after the time fixed for its presentation has expired, the schedule should be revised, if no one is prejudiced, to permit its receipt. If the parties need time to prepare cross-examination or rebuttal, the original order of presentation can be resumed until cross-examination or rebuttal is prepared. If this is not feasible a brief recess may be called.

#### D. Some Common Problems

It is the judge's duty to keep control of the courtroom. A proper tone should be set to discourage counsel who seek to manage the hearing for the judge. The judge must be alert to detect and restrain such counsel, whose tactics take many forms. They may stall on cross-examination until the noon or evening recess to get time to think of more questions. They may violently contest the judge's rulings, either by incessant argument or by repeated inconsequential changes in the form of a stricken question. They may inject themselves into matters of no interest to their clients. They may fail to have their witnesses present when they are scheduled to testify. If these tactics are successful, they may produce in opposing counsel not only animosity but emulation. The resulting record is unmanageable.

If one or more of the parties is engaged or interested in a related administrative or judicial proceeding, counsel may attempt to develop evidence only peripherally relevant in order to use it in the other proceeding. The judge

must stop such attempts or end up with a record containing vast amounts of useless material.<sup>255</sup>

If tempers become short and an altercation threatens to disrupt the hearing, the judge must restore order. In some cases a recess may be useful. If counsel, a witness, or any person in the hearing room becomes unruly or offensive in remarks or manner, the judge should assert control, express disapproval of the opprobrious conduct and warn against a repetition.

The judge might also consider directing that the objectionable remarks be stricken physically from the record,<sup>256</sup> but this power should *rarely* be used. The sensibilities of agencies are not easily offended. No matter how offensive, obscene, slanderous, or vile, the questionable remarks may be relevant to a later charge concerning the credibility or other actions of the person making the remarks. Generally, material should be stricken physically only with the consent of all parties and only where the material has no conceivable relevance to the merits, or to an adequate record of the case.

A final resort is to exclude counsel from further participation in the case, to take prejudicial action against the client if authorized by statute or rule, or to recommend disciplinary action by the agency.

## E. Off-the-Record Discussions

The reporter should be instructed to make a verbatim transcript of the proceeding unless directed by the judge to go off the record. The judge should seldom go off the record, however. True enough, off-the-record discussions sometimes can be helpful in considering mechanical details of the hearing, such as procedural dates or the order of presentation of witnesses. They may also be appropriate in handling emergency situations such as the sudden illness of a witness.

They may also help to clear up substantive matters without cluttering the record. For example, counsel and the witness may so confuse each other that the record makes little or no sense. A short discussion off the record will clear up the problem and make the resulting record easier to understand. Similarly, counsel and witness may basically agree but their ideas of how to record the

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<sup>255</sup>See, e.g., Toolco-Northeast Control Case, 36 CAB 280, 283, 285, 302, 307, 308 (1962).

<sup>256</sup>Stricken material is included in the transcript with an annotation of the judge's ruling. Physically stricken material does not appear in the transcript. Cf. *Larter & Sons v. Dinkler Hotels Co., Inc.*, 199 F.2d 854 (5th Cir. 1952); *Ramsey v. United States*, 448 F. Supp. 1264 (N.D. Ill. 1978); *Midwest Helicopter Airways, Inc.*, 2 NTSB 623, 1973 NTSB Lexis 3 (Order EA-532, Docket SE-1765, 1973), *aff'd*, *Midwest Helicopter Airways, Inc. v. Butterfield*, Civil No. 74-1147 (7th Cir., filed Jan. 6, 1975).

matter may differ. A few minutes off the record may result in a succinct and accurate statement that may save substantial time and make a cleaner record.

This device must not, however, be overused. In fact, it should be used very sparingly. Requests for off-the-record discussions should be denied unless a verbatim transcript is clearly unnecessary or will serve no apparent purpose. Even when discussions are held off the record, decisions or agreements that result should be summarized for the record and confirmed by counsel to prevent later misunderstanding.

## F. Hearing Hours and Recesses

In complex, multiparty cases, some administrative law judges customarily hold hearings for approximately 5 hours per day--for example, 10 a.m. to 12:30 p.m. and 2 p.m. to 4:30 p.m. There is nothing magical about these hours, but such a schedule has several advantages. It allows time for the judge, counsel, and the parties to review, during the evening, the day's hearing and prepare for the next; without adequate preparation counsel's examination may be disorganized, rambling, and ineffective. Second, counsel, especially those from small offices, often need a few business hours each day to handle other matters. Finally, the concentration and constant attention required while a hearing is in session is mentally fatiguing. As a loose rule of thumb, counsel's examination is likely to become less articulate and concise after approximately 5 hours, and the risk of confusing, ambiguous, and mistaken questions and answers is increased.

The judge should extend or shorten the regularly scheduled sessions as the situation requires. For example, an afternoon session may be extended to permit an out-of-town witness to finish testifying and return home. If the hearing is drawing to a close on Friday afternoon, an evening session may be appropriate. Moreover, where it appears possible to complete the hearing in a single day, the judge, after consultation with counsel, may begin the hearing earlier and shorten the luncheon recess.

The judge should insist, of course, that 5-minute recesses do not drag into 15-minute ones, and that participants appear after recesses or intermissions at the appointed time.

## G. Audiovisual Coverage

Historically, the courts and the American Bar Association have tended to disapprove of photographing and telecasting courtroom proceedings. There was a time when Canon 3A(7) of the American Bar Association's Code of

Judicial Conduct stated that such procedures should not be permitted.<sup>257</sup> Similar blanket proscriptions were adopted by the bar and courts of many states. However, the United States Supreme Court held in a landmark criminal case that:

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudiced broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.<sup>258</sup>

In 1972 the Administrative Conference of the United States adopted Recommendation 72-1, which encouraged audiovisual coverage of certain proceedings, with safeguards to prevent disruption, and subject to the right of any witness to exclude coverage of the witness' testimony.<sup>259</sup>

At the time this recommendation was adopted, broadcasting of agency proceedings was very limited. The Atomic Energy Commission and the Social Security Administration uniformly denied such coverage, and other agencies, although some more equivocally than others, usually discouraged it. The Federal Communications Commission authorized television coverage at the discretion of its judges. Most agencies at that time however, discouraged such coverage.<sup>260</sup>

The Administrative Conference of the United States reviewed agency action upon its recommendation in 1977.<sup>261</sup> This review disclosed that only the Department of Labor,<sup>262</sup> the Federal Communications Commission, and the Consumer Product Safety Commission were in substantial conformity. Fourteen other agencies had partially complied.<sup>263</sup>

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<sup>257</sup>Merritt Ruhlen, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 66 (1982).

<sup>258</sup>*Chandler v. Florida*, 449 U.S. 560, 574-75 (1981).

<sup>259</sup>*Broadcast of Agency Proceedings*, 1 CFR §305.72-1 (1992). See also R. Bennett, *Broadcast Coverage of Administrative Proceedings*, 2 ACUS 625, 67 NW. L. REV. 528 (1972).

<sup>260</sup>Merritt Ruhlen, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 66 (1982).

<sup>261</sup>*Id.* at 67, citing Recommendation Implementation Summary, 8/29/77, 72-1.

<sup>262</sup>*Id.*, citing 29 CFR §§2.10-2.16 (1981) for Department of Labor regulations.

<sup>263</sup>*Id.*, also stating at n. 129, "The Commodity Futures Trading Commission indicated that it had no formal policies on this subject. The Federal Power Commission (now the Federal Energy Regulatory Commission) indicated disapproval."

In the 1990s, opposition to live or videotaped media coverage of trials and hearings has decreased, but remains substantial in some quarters. However, support for such coverage has grown to the point where a channel on cable TV is devoted largely to telecasting trials.<sup>264</sup>

On the administrative front, the overall picture is likewise mixed. For example, the Social Security Administration takes the position that Social Security hearings involve private claims. Accordingly, the hearing is not public in the usual sense. Outside observers, and this presumably includes the media, may not be present unless all claimants to the hearing consent and the ALJ finds that the outsider's presence would not disrupt the hearing.<sup>265</sup> Among the agencies with regulations concerning, or mentioning, media coverage are such varied organizations as the National Oceanic and Atmospheric Administration of the Department of Commerce,<sup>266</sup> the Education and Appeal Board of the Department of Education,<sup>267</sup> the ICC,<sup>268</sup> the Department of the Interior's Fish and Wildlife Service,<sup>269</sup> and the FDA.<sup>270</sup>

The question for judges in many agencies therefore is no longer whether it is within their authority to permit audiovisual coverage of formal hearings. The question is one of following agency rules, and where agency rules give them discretion, the questions then multiply. Should any live or videotaped coverage be allowed? If so, in what form? Can a fair hearing can be assured in the presence of such coverage, and, if so, what precautionary measures can and should be imposed?

For dealing with such questions, the judge should consider a number of factors and policies. For one thing, the free press educates and informs citizens about public affairs, and as a by-product helps induce honesty and integrity in our government. Moreover, government officials and government employees are servants of the public. We sometimes forget that the "public" is a shorthand term for that inchoate conglomerate of *all* U.S. citizens--who are the true "owners" of all government property, including information generated and being generated by the "government." Nevertheless, although all information, with certain limited exceptions such as national security, should be revealed to the public, this does not necessarily imply the right to use any

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<sup>264</sup>*E.g.*, Goodman, *The Wheels of Justice, Live on Cable*, New York Times, Section C, p. 17, col. 1 (July 3, 1991).

<sup>265</sup>Social Security Administration, Office of Hearings and Appeals, Hearings, Appeals, Litigation and Law manual (HALLEX), I-2-650 (1990) (hereinafter, HALLEX).

<sup>266</sup>15 CFR §981.560 (1991).

<sup>267</sup>34 CFR §4.807 (1991).

<sup>268</sup>49 CFR §1113.3 (1991).

<sup>269</sup>50 CFR §18.76 (1991) (Marine Mammals, hearings on Section 103 Regulations).

<sup>270</sup>21 CFR §10.200, *et seq.* (1991).

particular method to obtain such information. To determine the extent to which audio-visual coverage should be permitted, it is worthwhile to consider the most frequent objections.

## 1. Physical Interference

The lights, cameras, microphones, and wires that frequently accompany broadcasting (particularly television), can physically interfere with the hearing. Unrestricted deployment of broadcast equipment, personnel, and glaring lights throughout the hearing room may be seriously disruptive.<sup>271</sup> However, with modern broadcasting equipment, physical disruption is not now an inevitable consequence of telecasting. Television broadcasting can now take place with inconspicuous and distant cameras using nonirritating lights. Simple videotaping can be even less intrusive.

Requests for coverage by several stations may also cause problems. However, if more than one station wants to cover a proceeding they can all be limited to one set of microphones and one set of cameras. Another possibility might be pool coverage of some sort.

## 2. Interference with the Dignity of Proceedings

The presence of cameras, microphones, lights, and wires is sometimes said to detract from the dignity of formal proceedings. This may be merely another way of describing the physical disruption problem. There may be some, however, who feel that even unobtrusive recording equipment is undignified as a matter of aesthetics.

Any such concern probably is too insubstantial to justify exclusion. With reference to trial publicity the Supreme Court has said "where there was 'no threat or menace to the integrity of the trial'. . . we have constantly required that the press have a free hand, even though we sometimes deplored its sensationalism."<sup>272</sup> Similarly, unless there is a more tangible basis for exclusion than dignity, the interest in acquiring information directly must prevail.

## 3. Psychological Distraction

The presence of electronic media may present a risk of psychological distraction. The knowledge that electronic media are present may convey to the parties, witnesses, and attorneys the feeling that their actions are taking place on a stage, rather than in a hearing room. This may lead some to

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<sup>271</sup>See, e.g., *Estes v. Texas*, 381 U.S. 532 (1965).

<sup>272</sup>*Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

withdraw in shyness and others to play up to that larger audience. In either event it will distort conduct.

This concern is greatly exaggerated. Television has been used in dozens of federal administrative proceedings without undue consequences.<sup>273</sup> As its use becomes more common, the psychological effect will be minimized. Moreover, this is a problem that can be handled by the judge, who can ensure the preservation of decorum and fair play by instructing representatives of the news media and others as to permissible activities in the hearing room, by the equitable assignment of seats to news media representatives and others, and by such other action as may be necessary. Audio-visual coverage should be permitted only so long as it is conducted unobtrusively and does not interfere with the orderly conduct of the proceeding.

## H. Taking Notes

The extent to which the judge should take notes depends on personal temperament and work habits. Some judges take no notes, feeling that it distracts from the immediate task of controlling the hearing. Others prepare a simple topical index. Still others take detailed notes of the testimony of each witness, which a secretary may later type, possibly with transcript references. Such notes should be considered the personal property of the judge. They should not be made available to counsel under any circumstances.

Some judges make notations on the written exhibits and testimony that are later keyed to the transcript by a secretary or law clerk. This makes searching the record substantially easier when the judge is writing the decision.

In a protracted hearing involving numerous exhibits and requests for supplemental data the judge should at least note the identification of each exhibit, in order to verify that it has been offered and received in evidence before the sponsoring witness is excused. The judge should note the details of any arrangement for submission of supplemental material. At the opening of the hearing each day the judge should consult the notes and inquire of counsel whether the material requested for that day is available. If anything is to be submitted after the close of the hearing, the judge should review notes on the final hearing day and remind counsel of the material to be submitted and the submission date.

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<sup>273</sup>Merritt Ruhlen, *MANUAL FOR ADMINISTRATIVE LAW JUDGES* 68 (1982).

## VII. Conduct

An administrative law judge is subject to several different, but overlapping, standards of behavior. As a lawyer, the judge is subject to the ethical canons of the bar.<sup>274</sup> As a federal employee, the judge must comply with the laws and regulations generally applicable to employees of the federal government.<sup>275</sup> As the employee of a particular federal agency, the judge is responsible for following that agency's rules. Some agencies' rules in fact specifically address administrative law judges,<sup>276</sup> presiding officers,<sup>277</sup> or the conduct of those involved in proceedings before the agency.<sup>278</sup>

Interestingly enough, the administrative law judge is not automatically governed by professional codes applicable to the judiciary. The Model Code of Judicial Conduct itself states, "Applicability of this Code to administrative law judges should be determined by each adopting jurisdiction. . . . [E]ach adopting jurisdiction should consider the unique characteristics of particular administrative law judge positions in adopting and adapting the Code for administrative law judges."<sup>279</sup> Therefore the Model Code of Judicial Conduct (Judicial Code) is not directly applicable to a federal administrative law judge unless or until it is adopted by the judge's employing agency, or by the federal government as a whole.

However, the Judicial Code is highly relevant to the administrative law judge. If nothing else, it provides a "model" in the generic sense for judges to observe. It also provides, *indirectly*, a source of guidelines by which to assess the propriety of a judge's behavior.<sup>280</sup> Moreover, some federal agencies have, in their rules, incorporated by reference the judicial "canons" of ethics or

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<sup>274</sup>*E.g.*, American Bar Association, Model Rules of Professional Conduct (1984).

<sup>275</sup>*See* 57 Fed. Reg. 35006 (Aug. 7, 1992), to be codified at 5 CFR Part 2635.

<sup>276</sup>*See, e.g.*, 14 CFR §300.1 (1991) (DOT Aviation Proceedings); 40 CFR §164.40 (1991) (EPA Pesticide Proceedings); 43 CFR §4.1122 (1991) (Department of the Interior Surface Coal Mine Hearings and Appeals).

<sup>277</sup>*E.g.*, 50 CFR §18.76 (1991) (Department of the Interior, Marine Mammals Section 103 Regulations).

<sup>278</sup>*E.g.*, 21 CFR §12.90 (FDA, Conduct at oral hearings or conferences).

<sup>279</sup>American Bar Association, Model Code of Judicial Conduct 34, n.3 (1990).

<sup>280</sup>For a discussion of the Code of Judicial Conduct as a source of guidelines and analogies, see Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated Ethics*, 94 DICKINSON L. REV. 929, 949-50 (1990) (citing a Merit System Protection Board case, *In re Chocallo*, 2 M.S.P.B. 23, *aff'd* 2 M.S.P.B. 20 (1980), and ABA Informal Opinions of the Committee on Ethics and Professional Responsibility).

code.<sup>281</sup> Finally, the Judicial Code has provided the basis for a Model Code specifically developed for administrative law judges--the Model Code of Conduct for Federal Administrative Law Judges (ALJ Code).<sup>282</sup>

As with the Judicial Code, the ALJ Code is not self-enforcing. To be directly controlling or applicable, it must be adopted by the appropriate governmental authority. However, it was endorsed by the Executive Committee of the National Conference of Administrative Law Judges in 1989, and this endorsement was intended to reflect "the considered judgment of the Conference on appropriate provisions" adapting the Model Code of Judicial Conduct for application to administrative law judges.<sup>283</sup>

The ALJ Code contains seven numbered canons, with explanations and commentary.<sup>284</sup> Omitting the explanations and commentary, the canons themselves are:

#### Canon 1

An Administrative Law Judge Should Uphold the Integrity and Independence of the Administrative Judiciary.

#### Canon 2

An Administrative Law Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities.

#### Canon 3

An Administrative Law Judge Should Perform the Duties of the Office Impartially and Diligently.

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<sup>281</sup>40 CFR §164.40 (1991) (EPA Pesticide Programs: "shall conduct the proceeding in .manner subject to the precepts of the Canons of Judicial Ethics of the American Bar Association); 43 CFR §4.1122 (1991) (Interior Surface Coal Hearings: "Administrative law judges shall adhere to the 'Code of Judicial Conduct.'). See also 14 CFR §300.1 (1991) (DOT, "are expected to conduct themselves with the same fidelity to appropriate standards of propriety that characterize a court and its staff"); 43 CFR §4.27(d) (1991) (Interior General Rules: "shall withdraw from a case if he deems himself disqualified under the recognized canons of judicial ethics").

<sup>282</sup>ABA, Model Code of Judicial Conduct for Federal Administrative Law Judges *Preface* at p. 3 (1989); see also Yoder, *Preface, Model Code of Judicial Conduct for Federal Administrative Law Judges*, 10 (J. OF THE NAT'L ASSOC. OF ADMIN. L. JUDGES) 131 (1990).

<sup>283</sup>Yoder, *supra* note 281, at 132.

<sup>284</sup>American Bar Association, *supra* note 281, at 6-24; Yoder, *supra* note 281 at 134-48.

## Canon 4

An Administrative Law Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.

## Canon 5

An Administrative Law Judge Should Regulate His or Her Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties.

## Canon 6

An Administrative Law Judge Should Limit Compensation Received for Quasi-Judicial and Extra-Judicial Activities.

## Canon 7

An Administrative Law Judge Should Refrain from Political Activity Inappropriate to the Judicial Office.<sup>285</sup>

In some respects, the ALJ Code is only part of a larger set of considerations involving the conduct of administrative law judges. These considerations revolve around a tension between independence and accountability. On the one hand, it is crucial to preserve the judges' independence--insulating them from improper agency pressures with respect to the substance of their decisions. On the other hand, it is also crucial to ensure that the judges are accountable for improper conduct and unprofessional, inadequate performance.

These tensions have helped stimulate a growing body of studies, articles, and proposals regarding the status and conduct of administrative law judges.<sup>286</sup>

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<sup>285</sup>Administrative Law Judges, of course, are subject to laws regulating the partisan political activities of federal employees, e.g., the Hatch Act 5 U.S.C. §§7321-7327 (1988).

<sup>286</sup>E.g., ABA, *New ACUS Study on Administrative Law Judges*, 17 ADMINISTRATIVE LAW NEWS 1 (SUMMER 1992); Cofer, *The Question of Independence Continues: Administrative Law Judges Within the Social Security Administration*, 69 JUDICATURE 228 (Dec. 1985); Holmes, *ALJ Update: A Review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges*, 38 (FED. BAR NEWS & JOURNAL) 202 (May, 1991); Levant, *Pointing the Way to ALJ Independence*, 24 JUDGES JOURNAL 36 (Spring, 1985); Levinson, *The Proposed Administrative Law Judge Corps: An Incomplete But Important Reform Effort*, 19 NEW ENG. L. REV. 733 (1984); Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for Regulated*

At the very least, the 1990s probably will be a period of reevaluation for administrative law judges. Changes, of a greater or lesser degree, are quite likely. Exactly what those changes will be and where they will lead remains an open question. In the meantime, however, there are several topics pertaining to professional conduct that should be discussed in this Manual.

### A. Disciplinary Actions Against ALJs

Although not an ideal source of guidance, some notion of at least minimal standards of acceptable conduct can be garnered from examining the current law and case precedents pertaining to disciplinary action against federal administrative law judges.

Statutorily, the employing agency can take disciplinary action against a judge "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing. . . ." <sup>287</sup> One must look to the cases decided by the Merit Systems Protection Board (MSPB), and the courts, for a gloss on what constitutes "good cause."

A study published in 1992 indicated that there had been about two dozen reported cases since 1946 involving discipline or removal of ALJs "for good cause" under 5 U.S.C. §7521. <sup>288</sup> Five of these cases apparently resulted in removal. <sup>289</sup> (The reported cases, of course, do not reflect resignations or adjustments that may have been reached without formal proceedings.)

Because the reported cases are few in number, their value is somewhat limited as a source of guidance. However, some consideration of them still may be instructive. The grounds for "good cause" reflected in these cases

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*Ethics*, 94 DICK. L. REV. 929 (1990); Moss, *Judges Under Fire: ALJ Independence At Issue*, 77 A.B.A.J. 56 (Nov. 1991); O'Keefe, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986); Palmer, *The Evolving Role of Administrative Law Judges*, 19 NEW ENGLAND L. REV. 755 (1984); Zankel, *A Unified Corps of Federal Administrative Law Judges Is Not Needed*, 6 W. NEW ENG. L. REV. 723 (1984).

<sup>287</sup> 5 U.S.C. §7521 (Supp. II 1990). Disciplinary sanctions can include removal, suspension, a reduction in grade, a reduction in pay, or furlough of 30 days or less. *Id.* In addition, action can be taken against an administrative law judge under 5 U.S.C. §7532 (Supp. II 1990) (pertaining to national security and related matters), or by MSPB Special Counsel under 5 U.S.C. §§1215, 1216 (Supp. II 1990).

<sup>288</sup> Federal Administrative Judiciary, *supra* note 4, at 1016-19. This figure is consistent with an earlier article on disciplinary proceedings against federal ALJs. Timony, *Disciplinary Proceedings Against Federal Administrative Law Judges*, 6 W. NEW ENG. L. REV. 807, at n. 1 and 2 (1984).

<sup>289</sup> *Id.* 155-56, at n. 1231.

seem to fall, for the most part, roughly into four categories: (1) personal conduct that is unrelated (or remotely related) to employment or professional duties; (2) misconduct, other than insubordination, related to the individual's behavior as a federal employee or judge (or both); (3) insubordination, with or without other misconduct; and (4) professional incompetence, *i.e.*, generally matters of productivity and the quality of the judge's adjudications. Some cases, of course, fall into more than one category.

*Personal Misconduct Unrelated to Employment.* Although there seems to be only one, relatively early case that falls purely within the "personal conduct" category, this case is enough to serve as a warning that a judge's purely personal life could furnish "good cause" for disciplinary action. In this case, financial irresponsibility in the form of failure to make any effort toward paying admitted debts was upheld as sufficient ground for disciplinary action and removal.<sup>290</sup> "Good cause" for disciplinary action and dismissal is not necessarily limited to matters directly related to the judge's "on-the-job" conduct and could be found in the conduct of the judge's personal life.

Unfortunately, a single case does not provide much guidance regarding exactly how far an agency could reach into a judge's private life to support a "for good cause" sanction or dismissal. The fact that there has been only one reported case clearly on point after nearly 50 years suggests that a "good cause" proceeding would not lightly be brought on the basis of a judge's private life or personal lifestyle. However, the existence of even one precedent for disciplinary action based on purely personal conduct (or misconduct) remains troublesome. An agency certainly might attempt to argue that a judge occupies an especially sensitive position, and that therefore purely personal, off-duty misbehavior might compromise the judge's effectiveness as an adjudicator. As always, there is language to be found in the cases that could support this (or almost any other) position. For example, "Honesty, integrity, and other essential attributes of good moral character are foremost among the qualities that lawyers, and especially judges, ought to possess if public confidence in the legal profession and the judiciary is to be promoted and preserved."<sup>291</sup>

*Misconduct (Other Than Insubordination).* In the category of misconduct, other than insubordination, the reported cases cover a fairly wide range of matters related to the judges' duties or at-work behavior. Some of the improprieties involve a judge's adjudicative actions which violate established norms of judicial conduct, such as accepting favors or gifts from a party in

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<sup>290</sup>McEachern v. Macy, 233 F. Supp. 516 (W.D.S.C. 1964), *aff'd*, 341 F.2d 895 (4th Cir. 1965). See 5 CFR §2635.809.

<sup>291</sup>*In re Spielman*, 1 MSPB 51, 56 (1979).

proceedings before the judge.<sup>292</sup> In others, serious improprieties by a judge in the actual conduct or adjudications have furnished "cause" for disciplinary actions.<sup>293</sup> Cases involving nonadjudicative actions include incidents of improper behavior toward fellow employees, such as sexual harassment,<sup>294</sup> and abusive, rude or assaultive conduct.<sup>295</sup> In some cases, the disciplinary action is predicated, at least in part, on nonadjudicatory conduct that is work-related, but that does not involve fellow employees; for instance, serious or recurring unauthorized personal use of government property,<sup>296</sup> and falsifying documents.

*Insubordination.* The category of insubordination likewise covers a fairly wide range of specific factual incidents, but these incidents of course concern the judges' conduct toward supervisors or superiors. The cases generally fall into one of two subcategories. First, there is insubordination in the form of deliberate disobedience of valid orders or directives--refusal to comply with instructions, procedures, or case assignments.<sup>297</sup> Second, there is insubordination in the form of rude or abusive behavior toward a supervisor or

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<sup>292</sup>Hasson v. Hampton, 34 AD. L. REP. 2d (P&F) 19 (D.D.C. 1973), *aff'd mem.*, D.C. Cir. (April 20, 1976).

<sup>293</sup>SSA v. Friedman, 41 MSPR 430 (1989) (canceling hearings without reason); *In re Chacallo*, 2 MSPR 20 (1980) (affirmed by unpublished opinions in D.D.C. and D.C. Cir.) (demonstrated bias and lack of judicial temperament, in addition to various acts of disobedience and insubordination). See also SSA v. Anyel, Docket No. CB75219009T1 (MSPB, January 16, 1992) (ALJ slip opinion) (upholding charge based on SSA ALJ's treatment of *pro se* claimants, remanded on other grounds, MSPB opinion and order, June 25, 1993).

<sup>294</sup>SSA v. Davis, 19 MSPR 279 (1984), *aff'd*, 758 F.2d 661 (C.A.F.C. 1984) (unpublished opinion) (lewd and lascivious remarks to employees); SSA v. Carter, 35 MSPR 485, 1987 MSPB Lexis 176 (1987) (sexual harassment).

<sup>295</sup>Department of Commerce v. Dolan, 39 MSPR 314 (1988) (kicking employee); *In re Glover*, 1 MSPR 660, 663 (1979) (grabbing memo, pushing employee, pressing cover of copying machine on employee's hand).

<sup>296</sup>SSA v. Givens, 27 MSPR 360, 1985 MSPB Lexis 1130 (1985) (personal use of government car).

<sup>297</sup>*E.g.*, SSA v. Boham, 38 MSPR 540 (1988) (refusing to hear cases involving overnight travel); SSA v. Brennan, 27 MSPR 242 (1985), *aff'd sub. nom.* Brennan v. DHHS, 787 F.2d 1559 (C.A. F.C. 1986) (refusing to follow case proceeding procedures, including routing of mail and use of worksheets); SSA v. Manion, 19 MSPR 298 (1984) (refusing to schedule hearings); SSA v. Arterberry, 15 MSPR 320 (1983), *aff'd in unpublished opinion*, 732 F.2d 166 (C.A. F.C. 1984); *In re Chacallo*, 2 MSPR 20 (1980) (among other things, refusing to return case files and conducting a hearing after the case had been removed from the judge's jurisdiction) *aff'd by unpublished opinions* in D.D.C. and D.C. Cir.

other superior. Cases in this subcategory, of course, may involve both disobedience and abusive behavior, as well as other misconduct.<sup>298</sup>

As to the first three categories, the reported cases are of limited direct value, in and of themselves, as guides for a judge's conduct. They are few in number and deal with fact-specific situations. However, they are worthwhile gloss on the subject of an administrative law judge's conduct. The cases suggest that the judge who observes simple courtesy toward subordinates and peers, who displays a veneer of respect for supervisors, and who generally treats others the way the judge would like to be treated will go a long way toward satisfying any reasonable standards of conduct.

*Professional Incompetence--Productivity/Quality.* There remains the troublesome issue of professional competence and its relation to "for good cause"--in particular, matters of productivity and quality of adjudication. The problems, of course, orbit around mainly the need to reconcile accountability with adjudicative independence.

The cases themselves seem to recognize this problem, and consequently might be described as "squinting" both ways. For example, one leading study has described three significant SSA-ALJ "productivity" cases decided by the Merit Systems Protection Board (MSPB) in 1984 as "a pyrrhic victory" for the agency.<sup>299</sup> "The agency won the right to bring low-productivity-based charges against ALJs," but lost before the MSPB, which rejected the agency's statistical evidence.<sup>300</sup> In the first of the cases, the agency had presented evidence that the judge's case dispositions were about half the national average, but the MSPB "opined that SSA cases were not fungible and that SSA's comparative statistics did not take into sufficient account the differences among these types of cases. The same reasoning was later applied to [the] two other pending cases against SSA ALJs with similar productivity records."<sup>301</sup>

In another line of cases that did *not* directly involve the MSPB, some ALJ challenges to certain agency-management initiatives regarding productivity and uniformity have resulted in similar examples of judicial squinting. One significant judicial opinion said, at one point, that an SSA "goal" of 338

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<sup>298</sup>*E.g.*, *SSA v. Burris*, 38 MSPR 51 (1988), *aff'd*, 878 F.2d 1445 (C.A.F.C. 1989) (unpublished opinion) (insubordination with travel vouchers, office disruptions, attempts to undermine supervisor's authority by countermanding his instructions, ridiculing him, and unreasonably refusing to deal directly with him); *SSA v. Glover*, 23 MSPR 57 (1984) (vulgarity toward supervisor, throwing files).

<sup>299</sup>Federal Administrative Judiciary, *supra* note 4, at 1020. The cases were *SSA v. Goodman*, 19 MSPR 321 (1984); *SSA v. Brennan*, 19 MSPR 335, *opinion clarified*, 20 MSPR 34 (1984), and *SSA v. Balaban*, 20 MSPR 675 (1984).

<sup>300</sup>*Id.* at 156-57.

<sup>301</sup>*Id.*

decisions annually per ALJ was reasonable,<sup>302</sup> and that policies "designed to ensure a reasonable degree of uniformity among ALJ decisions are not only within the bound of legitimate agency supervision but are to be encouraged."<sup>303</sup> But the same opinion also waxed critical and suspicious of the agency's policies. "To coerce ALJs into lowering reversal rates. . . would, if shown, constitute. . . 'a clear infringement of judicial independence.'"<sup>304</sup>

In a recent case, the MSPB stated that "a high rate of significant statutory error can establish good cause for disciplining an administrative law judge. . . ." <sup>305</sup> The case was remanded and is still pending as this goes to press.

About all this Manual can do is conclude that, in theory, the power of an agency to bring "good cause" actions against unproductive or incompetent judges certainly exists. So far, the MSPB appears to have been cautious in the actual application of that theory. This is understandable, and justified, because such actions could raise serious problems related to reconciling the need for professional competence with the need for adjudicative independence. Those problems are likely to be with us for the foreseeable future. In the meantime, it is probably safe to say that no ALJ should want to be the subject of a future case that tests an agency's power to discharge "for good cause" on grounds of demonstrably slack productivity.

## B. Confidentiality

Although the judge presides over a hearing that in most agencies is open to the public, and compiles what will usually be a public record, there are aspects of the judge's duties that require confidentiality. When confidentiality is required, the judge should be above reproach.

For example, there is the matter of the judge's decision. Until the decision is finally issued or published the judge should in no way reveal it to the parties, the agency, the agency staff, or anyone else except one's own staff and associates (who are themselves subject to the same rules). Maintaining this secrecy requires constant circumspection.

On a matter related to duties of a more recent vintage, the judge must become especially sensitive to the need for confidentiality in certain phases and

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<sup>302</sup>Nash v. Bowen, 869 F.2d 675, 680 (2nd Cir. 1989).

<sup>303</sup>*Id.*

<sup>304</sup>*Id.* at 681. For another example of an opinion which seemed distinctly ambivalent, see Ass'n of Administrative Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C., 1984) (criticizing aspects of SSA management program, but refusing to issue injunction because ameliorative changes had been made to the program in the meantime.)

<sup>305</sup>304 SSA v. Anyel, Docket No. CB7521910009T1 (MSPB June 25, 1993).

kinds of alternative dispute resolution proceedings. A prime example here, of course, is the confidentiality customarily accorded mediation efforts,<sup>306</sup> including mediation by settlement judges.<sup>307</sup>

### C. *Ex Parte* Communications

*Ex parte* communications should be avoided. Communications between the judge and one party, without the presence of the other party/parties, are always suspect. In formal adjudications governed by the APA, the ground rules are fairly clear and quite explicit. "Except to the extent required for the disposition of *ex parte* matters as authorized by law, [the judge] may not--(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate. . . ." <sup>308</sup> Moreover:

[E]xcept to the extent required for the disposition of *ex parte* matters as authorized by law--

(A) no interested person outside the agency shall make or knowingly cause to be made to any . . . administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;

(B) no . . . administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding;

(C) a[n]. . . administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process. . . who receives or who makes. . . a

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<sup>306</sup>See, e.g., ACUS Recommendation 88-11, "Encouraging Settlements by Protecting Mediator Confidentiality," 1 CFR §305.88-11 (1992).

<sup>307</sup>See, e.g., 29 CFR §2200.101(d)(3) (1991) (Occupational Safety & Health Review Commission).

<sup>308</sup>5 U.S.C. §554(d) (1988) (emphasis added).

communication prohibited by this subsection shall place on the public record of the proceeding:

- (i) all such written communications;
- (ii) memoranda stating the substance of all such oral communications; and
- (iii) all written responses, and memoranda stating the substance of all oral responses described in this subparagraph. . . .<sup>309</sup>

Moreover, the APA further provides that if a prohibited *ex parte* communication is knowingly made, the judge or other presiding officer, may (subject to agency policies and regulations) require the party making the communication to show cause why the party should not be dismissed as a party or otherwise sanctioned because of that violation.<sup>310</sup> The agency itself may be authorized to decide the whole case adversely to the offending party.<sup>311</sup> Furthermore, many agencies have their own regulations relating to the handling of *ex parte* communications, which the judge should rigorously observe.<sup>312</sup>

Some *ex parte* conversations are innocent in the sense that the person approaching the judge is unaware that this action is improper. When such an incident occurs, the judge, in proceedings governed by the above-quoted provisions of the APA, must prepare a written memorandum describing the conversation and file it in the public record in the docket section. This also must be done when another common type of innocent *ex parte* communication occurs--letters to the judge relating to the merits of the case.

Even for proceedings not covered by the APA, and even if the agency rules on *ex parte* contacts do not extend to the particular proceedings, a judge who has received *ex parte* communications on the merits probably should, in any event, make them part of the record. It is usually best to do one's utmost to remove any doubt about the proprieties of the matter.

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<sup>309</sup> 5 U.S.C. §557(d) (1988) (emphasis added).

<sup>310</sup> 5 U.S.C. §557(d)(1)(D) (1988).

<sup>311</sup> 5 U.S.C. §556(d) (1988).

<sup>312</sup> See, e.g., 14 CFR §300.2 (DOT, Aviation Proceedings).

## D. Bias and Recusal

Another sensitive and special matter concerning the conduct of judges involves bias. "[A]n impartial decisionmaker is essential."<sup>313</sup> Of course, no one is totally free from all possible forms of bias or prejudice. But the judge must conscientiously strive to set aside preconceptions and rule as objectively as possible on the basis of the evidence in the record. In addition, and despite a judge's subjective good faith, a judge who has a financial interest (even if small or diluted) in the outcome of a case should not decide that case.<sup>314</sup> If grounds for finding bias truly exist, then recusing oneself<sup>315</sup> is preferable to courting a later reversal and jeopardizing the validity of the whole proceedings.

## E. Fraternalization

In a related vein, conduct which creates an appearance of favoritism or bias also should be avoided. Public attitudes about judicial conduct have become stricter in recent years, and judges should be sensitive to this change. A judge should limit social activities with friends or colleagues if there is any likelihood of their being involved in matters coming before the judge. It is not enough merely to avoid discussing pending matters; a judge should shun situations that might lead anxious litigants or worried lawyers to think that the judge might favor or accept the views of friends more readily than those of unknown parties. The same considerations argue against social contacts with agency staff; any indication that the judge and staff are members of one happy family should be avoided.

One approach is for judges to maintain their personal ties but disqualify themselves in any case in which a friend appears. If the bar is small this may be unfair to counsel and their clients, and impractical as well. An alternative course is to describe publicly the relationships whenever a friend or associate is involved and offer to disqualify oneself if so requested. However, this places an unfair burden on objecting counsel, who is put in the position of implying publicly that the judge may be biased. Also, if done frequently, this approach may seem to be avoidance of the judge's own responsibility.

In any event, a judge must avoid the appearance of impropriety. Thus the judge should not regularly play bridge or golf or dine with lawyers whose

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<sup>313</sup>Goldberg v. Kelly, 397 U.S. 254, 271 (1970). For an excellent discussion of bias, see Federal Administrative Judiciary, *supra* note 4, at 967-974.

<sup>314</sup>See Ward v. Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

<sup>315</sup>U.S.C. §556(b)(1988). See also 51 ALR Fed. 400.

firms may appear before him. Nor should the judge actively participate in politics or political meetings.<sup>316</sup>

Judges must accept a certain amount of loneliness. They need not become recluses, but they should realize they are no longer "one of the gang."

## F. Individual Requests for Information

The judge may receive requests for information from interested persons. The material sought may be confidential--such as which party will prevail, when the decision will be issued, and what effect it might have on the community. The judge should make every effort to explain courteously any refusals to answer. Sometimes, it may be possible, and appropriate, to deflect the inquiry with a suggestion that the person might be able to obtain additional information, and views, from sources not subject to judicial restraints, such as agency staff or private parties involved in the proceeding.

## G. Interaction with Other Independent Officers

While there is little case law on the subject, at least one case, *U.S. Navy-Marine Corps Court of Military Review v. Carlucci*, has raised the issue concerning the extent to which independent adjudicative officers must cooperate with investigations of the Inspector General.<sup>317</sup> While generally acknowledging the statutory right of IGs to investigate a judge's misappropriation of funds, fraudulent claims, or other abuses of appointment [see Section 9.1(a) of the ABA standards], the *Carlucci* case addresses the issue of an allegation of impermissible use of *ex parte* information during a judge's deliberations. This raises a question concerning the judge's duty under Judicial Canons to uphold the independence and integrity of the court when an IG seeks to investigate matters involved in judicial deliberations even after the case has closed and a final decision has been rendered. Agencies can provide appropriate procedural rules to handle such issues within their adjudicative divisions to preclude such problems from arising.

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<sup>316</sup>Federal administrative law judges are, of course, subject to the Hatch Act, 5 U.S.C. §§7321-7327 (1988), as amended by Pub. L. No. 103-94 (Oct. 6., 1993).

<sup>317</sup>See *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988); discussed in Joseph H. Baum and Kevin J. Barry, *United States Navy-Marine Corps Court of Military Review v. Carlucci: A Question of Judicial Independence*, FEDERAL BAR NEWS AND JOURNAL, Vol. 36, No. 5, June 1989, 242-248.

## H. The Media

The persistence of the press in a major or newsworthy case may be annoying at times, but the judge should cooperate, to the extent permitted by ethics and agency rules, in the circulation of public information about the proceeding. Questions about nonconfidential, public matters can be answered, so long as this does not interfere with the orderly conduct of the hearing. For example, the judge certainly may respond to queries about the place or time of the hearing or the length of a recess. The merits of the case, however, must be off-limits, both directly and by implication. The judge should not be interviewed under circumstances likely to lead to questions relating to the merits.

Likewise, the judge should not give off-the-record or not-for-attribution interviews. If the material is not confidential, quotation should be permitted; if it is confidential, it should not be revealed in the first place.

## VIII. The Decision

After receipt of all supplemental material and briefs the judge should prepare the decision, the findings of fact and conclusions of law. Agency rules and practice will govern the details of how the judge submits the decision to the agency and serves it upon the parties. The notice of decision should provide for filing of exceptions and briefs.

Some agencies have authorized their administrative law judges to make the agency's decision, subject only to discretionary review by the agency.<sup>318</sup> The title page of such a decision should state that it is an agency decision issued pursuant to delegated authority (citing the pertinent rules) and the notice of decision should describe how and when petitions for review may be filed. Any order attached to the decision should include a similar statement of delegated authority and should provide that, absent filing of a petition for discretionary review or review on the agency's own initiative, it will become effective as the final agency order after a specified time. The form for issuance of other decisions is similar, with such changes as are necessary to show that they are not final until affirmed by the agency or the agency review board.

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<sup>318</sup>See ACUS Recommendation 68-6, "Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency," 1 CFR §305.68-6 (1992). See also 29 CFR §2200.91 (1991) (Occupational Safety and Health Review Commission); 17 CFR §12.101, .106 (1991) (CFTC, reparation cases). For an article discussing discretionary review by agencies, see Gilliland, *The Certiorari-Type Review*, 26 ADMIN L. REV. 53 (1974).

The judge's jurisdiction usually ends upon the issuance of the decision, except that errors may be corrected by issuance of an errata sheet.<sup>319</sup> This should be used to correct serious errors of substance only, never to correct obvious typographical mistakes or errors already the subject of exceptions.

## A. Oral Decision

In cases involving few parties, limited issues, and short hearings the judge may save substantial time by rendering the decision orally--if permitted by agency rules or policies. However, it must be emphasized that agency rules or policies control. The rest of this section is relevant only to the extent that the judge has authority, in the first instance, to render an oral decision.<sup>320</sup>

If the judge is authorized to issue an oral decision, the parties can be advised before the hearing to prepare for oral argument on the merits at the close of the testimony. After all evidence has been received and any procedural matters disposed of, the judge may recess the hearing for a few minutes to give counsel an opportunity to read their notes and prepare for oral argument. After listening to oral argument and rebuttal, the judge, perhaps after another short recess, may deliver the decision orally on the record.

This procedure obviously increases the risk of overlooking some material fact or legal precedent, but in a case simple enough to truly warrant an oral decision, that risk is not substantial. There are, moreover, compensating advantages in addition to the time saved. If witness credibility is involved the demeanor and the actual testimony of the witness are fresh in the judge's mind.

Some cases involving formal adjudications will be governed by the provision of the APA that entitles the parties to a reasonable opportunity to submit proposed findings or conclusions, and supporting reasons, before a recommended, initial, or tentative decision.<sup>321</sup> Advising the parties before the end of the hearing that an oral decision will be made at the close of the

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<sup>319</sup>Form 14 in Appendix I is a sample errata sheet.

<sup>320</sup>For some cases where the judge exceeded any authority to rule orally under agency rules or precedents in force at that time, see *Local Union No. 195, United Ass'n of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry*, 237 NLRB 931, 99 LRRM 1098 (1978); *Plastic Film Products Corp. and Amalgamated Clothing and Textile Workers Union*, AFL-CIO 232 NLRB 722, 97 LRRM 1313 (1977).

<sup>321</sup>5 U.S.C. §557(c) (1988).

hearing, and that parties desiring to submit proposed findings and conclusions should be prepared to do so orally, probably meets this requirement.<sup>322</sup>

Sometimes, agency rules expressly authorize oral decisions. The Rules of Practice of the National Transportation Safety Board, for example, provide that "The law judge may render his initial decision orally at the close of the hearing. . . except as provided in §821.56(b)." <sup>323</sup>

When an oral decision is issued from the bench the transcript pages upon which the oral decision appears constitute the official decision. No editing except typographical corrections should be made. A footnote should be inserted after the decision stating, in effect: "Issued orally from the bench on \_\_\_\_\_ in transcript volume \_\_\_\_\_ at page \_\_\_\_\_ through page \_\_\_\_\_ ." <sup>324</sup>

## B. Written Decision

Most cases, because of their complexity, the size of the record, the number of parties, or the number of issues, do not lend themselves to oral disposition. The following discussion is directed to the drafting of written opinions, although some of the suggestions may also be applicable to oral decisions.

Ideally, the judge starts planning the decision when the case is assigned. Each procedural step, including learning and shaping the issues, determining what evidence is needed, arranging for and obtaining essential material, and conducting the hearing, should be aimed toward producing a clear, concise,

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<sup>322</sup>See Charles E. McElroy, 2 NTSB 444, 1973 NTSB Lexis 30 (Order EA-499, Docket No. SE-1772) (1973). However, it should be noted that this opinion seems to focus on compliance with the agency's rules.

<sup>323</sup>49 CFR §821.42 (1991). For some other examples of agency rules authorizing the judge to render a decision orally, see 7 CFR §1.142(c) (1991) (Department of Agriculture); 46 CFR §201.161 (1991) (Maritime Administration, DOT, referring to decision "orally rendered").

<sup>324</sup>For examples of agency rules that expressly deal with the transcript of an oral decision, or otherwise reducing an oral decision to writing, see 7 CFR §1.142(c)(2) (1991) (Department of Agriculture: copy to be excerpted from the transcript and furnished the parties by the Hearing Clerk); 39 CFR §961.8(g) (1991) (U.S. Postal Service: written confirmation of oral decision to be sent to the parties); 49 CFR §821.42 (d) (1991) (NTSB, copy excerpted from transcript and furnished to parties).

and fair record.<sup>325</sup> Any weakness or delinquency in these earlier steps makes the final task more difficult.

Still, the most difficult writing problem usually occurs when the judge, facing an onerous deadline, assembles the transcript, exhibits, notes, and briefs, and starts to put down on paper the findings and conclusions. Each judge differs in writing habits, but all judges should strive constantly for improvement.

Some aspects of decision-writing, like any other form of composition, probably cannot be "taught," at least not in the sense of learning some rote formula or mechanical "rules" that will make the judge rival Oliver Wendell Holmes as a wordsmith. Most of us probably have harbored mild envy, at one time or another, toward a colleague who seems to have a natural talent for writing. There are judges who seem to have a remarkable ability to organize the material, and to use language in a way that converts a thick, jumbled record into a coherent decision where everything falls into place, capturing the essence of what happened and what the case is about, and how it should be decided. Such a decision leaves the reader with a sense of inevitability--that *this* was the only way that this particular decision could have been written. Most judicial opinions fall short of such an ideal, but it is a goal worth keeping in mind. It generally takes considerable effort and experience to attain such a state of craftsmanship.<sup>326</sup>

In the meantime, there are certain approaches, procedures, and tools that may help to make deciding and writing the case easier. Some of these will be the focus of the rest of this chapter.

## 1. Format

No rigid structure can be prescribed for all written decisions, but some uniformity in basic outline is customary. Every decision should contain certain preliminary material, including a *title page* with the name of the case, the type of decision (*e.g.*, initial decision or recommended decision), the date

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<sup>325</sup>Form 23 reflects one judge's innovative effort to keep the record and materials organized by using the ongoing computer revolution. In complex cases, Judge Tidwell, U.S. Court of Federal Claims, sometimes issues an order requiring parties to supplement their usual paper filings by providing the court with electronic copies (on floppy disk) of filings which are greater than two pages in length. Using the search capabilities of word processing programs such as WordPerfect, Judge Tidwell is able to locate information and points in the materials much more efficiently than otherwise could be done by trying to visually scan hundreds of pages of material. Letter from Judge Moody R. Tidwell, U.S. Court of Federal Claims, dated April 3, 1992, to Morell E. Mullins.

<sup>326</sup>For an excellent but brief article, see Stander, *Administrative Decision Writing*, 10 (J. OF THE NAT'L ASSOC. OF ADMIN. L. JUDGES) 149 (1990).

of issuance, and the name of the judge. If the decision is long, there should be a *table of contents*. Also, a list of *appearances* should be included, with the names of all persons and organizations who entered an appearance and the persons and organizations represented. The name and address of each person on whom the decision is to be served should be included on a *service sheet*, usually attached at either the beginning or end of the decision.

The form of the text depends largely on the nature of the case, agency practice, and the judge's style. The following suggestions may be helpful:

(a) The opening paragraphs should describe succinctly what the case is about. They may include a summary of the prior procedural steps and the applicable constitutional provisions, statutes, and regulations.

(b) Although the relief requested by the parties may be described in the introduction, *detailed contentions should not be recited*. These lengthen the opinion unnecessarily since, if they are material and relevant, they must be set forth in detail in discussing the merits. Not observing this proscription is a common failing in opinion writing.

(c) If proposed findings and conclusions have been submitted, the ruling on each of them should be apparent from the decision,<sup>327</sup> so the judge does not necessarily need to refer to each of them specifically.<sup>328</sup> Likewise, insignificant or irrelevant issues raised by the parties need not be addressed specifically but can be disposed of with a statement that all other questions raised have been considered and do not justify a change in the result.<sup>329</sup> However, a judge must be extremely careful in applying this principle. If the agency or a reviewing court disagrees about the significance of a particular issue, remand may result.<sup>330</sup>

(d) The decision should include specific findings on all the major facts in issue without going into unnecessary detail.<sup>331</sup>

(e) The judge should apply the law to the facts and explain the decision. Whether the facts, law, and conclusions should be combined or placed in separate sections of the decision depends on the agency's requirements, the

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<sup>327</sup>5 U.S.C. §557(c) (1976).

<sup>328</sup>*Transcontinental Coach Type Service Case*, 14 CAB 720 (1951). Cf. *Michigan Consol. Gas Co. v. FPC*, 203 F.2d 895 (3d Cir. 1953).

<sup>329</sup>In *Northwest Air Service, Operating Authority*, 32 CAB 89, 97-98 (1960), the Board denied a motion requesting a specific ruling by the judge on each proposed finding. For a similar holding, see *Allegheny Segment 3 Renewal Proceeding*, 36 CAB 52, 54, n. 3 (1962).

<sup>330</sup>See, e.g., *Affiliation of Arizona Indian Centers, Inc. v. Dept. of Labor*, 709 F.2d 602 (9th Cir. 1983); *P&Z Company*, 6 OSHC (BNA) 1189, 1977 OSHD P22,055 (1977).

<sup>331</sup>See, e.g., *People for Environmental Enlightenment and Responsibility (PEER) v. Minnesota Environmental Quality Council*, 266 N.W. 2d 858 (Minn. 1978).

judge's style and such other factors as the type of case and the nature of the record.

(f) The decision should end with a summary of the principal findings of fact and conclusions of law. In addition to making specific findings and conclusions, there should be ultimate findings framed in the applicable statutory or regulatory language.<sup>332</sup>

In a case involving many issues or complicated facts, the decision can be divided into labeled sections and subsections, with appropriate titles and subtitles. This will usually make reading, studying, and analysis of the decision easier and quicker. These divisions, with their titles, should be set forth in the table of contents.

Frequently, adopting a framework, or outline, for the decision with appropriate headings before drafting the decision will make organizing the record, deciding the issues, and writing the conclusions easier and clearer. This outline can, and probably should, change as the decisionmaking progresses.

(g) Footnotes should be used for such material as citations of authority and cross-references, but rarely for substantive discussion. Footnotes on each page are preferable to a numerical listing of notes (endnotes) at the end of the opinion or in an appendix. The latter arrangement is inconvenient for the reader and hinders careful reading of the decision.

(h) Citations must be sufficiently detailed to enable the researcher to find the source without difficulty. This can be assured by using a standard reference work.<sup>333</sup>

(i) Maps, charts, technical data, accounts, financial reports, forecasts, procedural details, and other germane background material too lengthy to be included in the text may be attached as appendices.

(j) In many cases the judge issues an order or proposed order. In some cases other actions are appropriate. For example, in franchise cases, a certificate must sometimes be issued or amended. Such documents should usually be added as supplements to the decision.

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<sup>332</sup>Expressly setting out "ultimate" findings in words that track the statutory language or criteria is a precaution that is strongly advisable because there are older Supreme Court cases that suggest that such findings cannot be inferred from the decision's other findings and conclusions. See *Yonkers v. United States*, 320 U.S. 685 (1944); *Wichita Railroad v. Public Utilities Commission*, 260 U.S. 48 (1922). *But see Penn Central Merger Cases*, 389 U.S. 486 (1968).

<sup>333</sup>*E.g.*, A Uniform System of Citation (15th ed. 1991) (commonly referred to as the "Blue Book").

## 2. Research

The judge must study the record and make an independent analysis of the facts and contentions. This requires careful examination of legal and policy precedents of the agency and of the courts.

In some agencies technical assistants may be available to administrative law judges to help analyze and cross-index detailed or complicated data. At other agencies law clerks are available to provide this help.<sup>334</sup>

In researching agency decisions the judge should cover those not yet published in the bound volumes of the official reports. Many agencies have a section charged with indexing and digesting decisions and orders; the judge should enlist its help in finding relevant agency authority. Some agencies maintain a list of all their cases appealed to the courts and supply their judges with current copies.<sup>335</sup>

The judge may also seek the advice of the senior judges of the agency, who may recall a relevant case that has escaped the attention of other researchers. Of course the standard research texts should also be used--notably the commercial services, texts, and law reviews. Moreover, the judge must take advantage of the on-going revolution in electronic databases and computer-based electronic research. Today's commercially available services, such as Lexis and Westlaw, enable a user to conduct legal, and other, research in ways that simply would not have been feasible for a decision-writer laboring under a heavy caseload and time deadlines 10 years ago. For example, a judge using computerized legal research services literally could have at the fingertips every case decided by a particular agency, if the agency's cases are in the relevant database. Every case "in the computer" mentioning a particular regulation can be retrieved with a few strokes on a keyboard. Or, a judge could locate almost every reference in the CFR (except perhaps the changes that have only been recently published) to a term like "in camera." Research that took hours, or simply could not have been done without poring for days over printed materials, can be finished in minutes, using computerized legal research. The main problem, of course, is that the cases or other materials for which the judge is searching must first be in the particular data base.

Another convenient source of information about relevant facts, policy, and law is the briefs of the parties. Proposed findings of fact and conclusions of law, if reliable, can save the judge time and effort. Of course, the judge must

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<sup>334</sup>For an article dealing with legal and technical assistants, see Mathias, *The Use of Legal and Technical Assistants by Administrative Law Judges in Administrative Proceedings*, 1 ADMIN. L. J. 107 (1987).

<sup>335</sup>See, e.g., cases collected by the now-defunct CAB, in its *Compilation of Court Cases of the Civil Aeronautics Board*.

consider the reliability of counsel or the party, or both. But it is certainly acceptable to make proper use of proposed findings and conclusions.<sup>336</sup>

Although this use of counsel's briefs and arguments is beneficial the judge alone is responsible for the decision. The judge must use the utmost care to be sure that findings of fact are supported by the record and the conclusions of law by reliable precedent. This may require study of the legislative history of relevant statutes or review of the law of another agency that regulates a similar industry or activity.

### 3. The Decisional Process

The cornerstone of the formal administrative process is the principle that the decision of the administrative law judge is an independent intellectual judgment, based solely upon the applicable law (including agency regulations and precedent) and the facts contained in the record. This has several consequences.

Unless properly entered into the record of the case, the judge should not consider public or private statements of agency members, Congressmen, congressional committees, or administration officials. Other than statements that are considered part of the legislative history of the relevant statute, the only nonrecord pronouncements of government officials relevant to the decision are *official* and *operative* pronouncements--agency rules and decisions, but not policy statements by the agency members; current Executive Orders, but not speeches by administration officials; statutes and relevant legislative history, but not newspaper interviews of Congressmen.

Such statements, however high the source, are normally made without benefit of the facts and arguments developed in the hearing process. Still more important, in many cases the APA would prohibit the use of matters which are not on the record. "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the *exclusive* record for decision in accordance with section 557 of this title."<sup>337</sup> Even if the proceedings are not controlled by the APA's statutory limitations, it is still the better part of judging to avoid basing a decision on anything extraneous to the record.<sup>338</sup>

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<sup>336</sup>See, e.g., *Schwerman Trucking Co. v. Gartland Steamship Co.*, 496 F.2d 466, 475 (7th Cir. 1974).

<sup>337</sup>5 U.S.C. §556(e) (1988). This section also provides for official notice.

<sup>338</sup>See *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977) (rulemaking). *But see* *Action for Children's Television Network v. FCC*, 564 F.2d 468 (D.C. Cir. 1977) (rulemaking); *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (rulemaking). While the cases cited here involved rulemaking of one sort or another, and (in the main) *ex parte* contacts at agency head

A few words are necessary concerning the relationship which the decision should bear to the established policies of the agency. Those words are: It is the judge's duty to decide all cases in accordance with agency policy.

This duty can be especially perplexing in at least two types of situations. First, court decisions (other than those of the Supreme Court) may have found the agency's policy or view to be erroneous, but the agency disagrees, and announces its "nonacquiescence." In this case, the agency takes the position that the judge is bound to apply the agency view if the agency has authoritatively declared nonacquiescence.<sup>339</sup> Nonacquiescence has been strongly criticized by some reviewing courts.<sup>340</sup>

Second, the judge may have to decide a case under statutory criteria that are open-ended, such as "public interest," and the agency's decisional precedents are policy-intensive, rather than strictly legalistic. On the one hand, if the judge operating under such a regime can discern the agency policy, then the judge's decision must adhere to that policy. On the other hand, if the parties have introduced evidence or arguments not previously considered by the agency, or if there are facts or circumstances indicating that reconsideration of established agency policy may be necessary, the judge has not only a right but a duty to consider such matters and rule accordingly.

A more extended discussion of an example may be appropriate at this juncture. At the old Civil Aeronautics Board, labor protective conditions were an issue in most merger cases. Historically, the Board adopted, with certain modifications, conditions similar to those used in the railroad industry.<sup>341</sup> Although the fairness of these conditions was frequently attacked, the Board,

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level, the point in the text remains the same. The administrative law judge's use of extra-record materials is likely to provide colorable grounds for appeal, at the very least.

<sup>339</sup>See *Insurance Agents International Union*, 119 NLRB 768 (1957).

<sup>340</sup>*Ithaca College v. NLRB*, 623 F.2d 224 (2d Cir. 1980). For a case which recognizes that the ALJ is somewhat whipsawed if an agency is "nonacquiescent," see *Hillhouse v. Harris*, 547 F. Supp. 88, 93 (W.D. Ark. 1982), *aff'd*, 715 F.2d 428 (8th Cir. 1983) (referring to ALJ being in the position of trying to serve two masters, the courts and the Secretary of Health and Human Services). "Nonacquiescence" has generated a substantial number of law review articles, among them, Diller & Morowetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Estreicher & Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence: A Reply*, 99 YALE L.J. 831 (1990); Estreicher & Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679 (1989); J. Schwartz, *Nonacquiescence, Crowell v. Benson, and Administrative Adjudication*, 77 GEO. WASH. L.J. 1815 (1989) Weis, *Agency Non-Acquiescence: Respectful Lawlessness or Legitimate Disagreement?*, 48 U. PITT. L. REV. 845 (1987); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985).

<sup>341</sup>*United-Capital Merger*, 33 CAB 323, n. 71 (1961).

with minor changes, adhered to these basic rules at least through 1970.<sup>342</sup> In 1972, in the *Allegheny-Mohawk Merger*<sup>343</sup> and the *Delta-Northeast Merger*,<sup>344</sup> two judges independently considered the standard CAB labor protective provisions in light of current economic conditions and recommended modifying them. The Board considered these modifications and adopted some of them, with two dissenting Board members arguing for additional changes. In view of the Board's prior action on this issue and its staff's approval of the historical standard labor protective clauses in these cases, it is unlikely that the Board would have considered the need for changes had the issues not been raised by its judges.

Although the judge should follow agency policy and the law, the judge's decision may be the last opportunity to call the attention of the agency (or the courts if the agency denies review) to an important problem of law or policy. A judge who is wrong can easily be reversed, but a judge who is correct may prevent substantial inequity and injustice. Such action cannot be taken lightly but must reflect long and careful research and analysis. The judge's facts and reasoning, based on the record and the law, should be so clearly set forth that the agency will know exactly what has been done and why.

Turning to another delicate subject, the judge also must preserve the integrity of the decisional process in ways that are less obvious. For instance, the judge should never write a decision motivated by a desire to curry favor with the current heads of the agency, or based on considerations of the result that the judge thinks the current agency heads subjectively want. A judge's responsibility is to follow agency policy, or where necessary in a case of first impression, establish a policy consistent with existing agency policy. Attempting merely to predict future agency votes would be an abdication of this role. The whole purpose of the judge's decision is to give the agency the benefit of a considered decision after a proceeding specifically designed to elicit the truth. Nothing whatever is gained, and a lot can be lost, if a judge's decision seeks to set before the agency members only a mirror of their own thoughts, no matter how obtained.

It follows that the judge should not be swayed by any tentative finding of fact or tentative conclusion of law or policy contained in an order of investigation, an order to show cause, or any other action by which the agency has indicated how it may be thinking. Such premature findings may be based on staff recommendations and, although necessary for procedural reasons, are not the agency's final decision. Indeed, to attribute that kind of finality to

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<sup>342</sup>Northwest-Northeast Merger, 55 CAB 742, 753-756, 759 (1970).

<sup>343</sup>59 CAB 19, 31-40, 42-44, 69-77 (1972).

<sup>344</sup>59 CAB 608, 633-36, 692-702 (1972).

preliminary agency determinations would be to flirt with violations of procedural due process.<sup>345</sup>

Agency staff's views should be subjected to the same impartial scrutiny as the views of any other interested persons. The staff position is not automatically correct merely because it is put forward as an objective, untainted furthering of the public interest. It is the judge's responsibility to decide where the public interest lies, and the theory of the system presumes that this is best achieved by an impartial weighing of all facts and arguments.

Turning to more mechanical aspects of decisionmaking, the judge sometimes must exercise discretion in determining which issues in a complex case to consider first--but once an issue that is determinative is decided the judge usually should proceed no further. It may be argued that if the agency disagrees as to the single decisive issue it will not have the benefit of the judge's independent analysis and recommendation on alternative issues. However, in a complex case the major issues are so numerous that to decide all of them in their various combinations could be a waste of time and generate an unreasonably long and complicated decision. It will likely be quicker and easier for the agency (if it disagrees with the judge) to develop one alternative dispositive issue than it is for the judge to develop a dozen alternatives initially. Nevertheless, in a case where the decision is close on either of two determinative issues, or where two important policy or legal issues are raised, it may be advisable to decide both.

The judge should not uncritically accept the parties' contentions as to which issues are decisive; through lack of skill, abundance of cunning, or excessive zeal, such premises may be erroneous. After analyzing the record and reading the briefs the judge should make an independent determination of the decisive issues and focus the decision on those issues, regardless of the parties' emphasis.

A decision must not, however, rest upon a point which has not been raised at the hearing, in briefs, or in oral argument. Thorough preparation and proper management of the earlier stages of the proceeding should avoid this problem; but if, after the proceeding has been concluded, the judge finds an unexplored issue that may be dispositive, at a minimum, supplementary briefs or memoranda should be requested.

The judge should decide all the issues necessary to dispose of the case unless circumstances indicate that some or all should be deferred. A decision may be deferred, for example, if it would be affected by the outcome of an appeal pending before the agency,<sup>346</sup> or before the Supreme Court.<sup>347</sup>

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<sup>345</sup>See *Withrow v. Larkin*, 421 U.S. 35 (1975).

<sup>346</sup>See *Flying Tiger-Additional Points Case*, 58 CAB, 319, 322, 364, 365 (1971).

However, there may be countervailing constraints, such as statutory time limits within which to issue a decision. These can limit the judge's authority to defer rendering a decision.

If in the course of hearing and deciding the case the judge discovers facts that indicate agency action may be necessary on other issues, recommendations for institution of another proceeding may be appropriate. For example, in a case involving the desirability of extending weekend family air fares to other days of the week, the judge realized that the legality of all family fares should be investigated, and recommended that the agency start such a proceeding.<sup>348</sup> The agency did so.<sup>349</sup>

If the parties timely raise new procedural questions after the close of the hearing, such as a motion to strike all or part of a brief, the judge should rule on them in the decision if practicable. However, when the question must be ruled upon before decision, such as a motion to receive newly discovered evidence, the judge should rule upon it promptly, deferring issuance of the decision if necessary. But if the parties merely renew procedural motions or objections made and disposed of at the hearing, the judge should let the record speak for itself unless new matters are presented that require further action or discussion.

#### 4. Style

Administrative cases frequently involve complicated technical matters, statistical concepts, intricate details and abstract ideas. The judge should strive to present these in a fashion that a layman can understand. Technical or abstruse words should be avoided if possible; if not, they should be explained in a footnote.

Decisions should be as brief as the subject matter permits. Complicated statistical, financial, and scientific questions frequently require detailed analysis, computations, or calculations. If these are included in the text, the opinion may become unnecessarily complicated, difficult to comprehend, and unreasonably long. It is frequently preferable to include only the basic findings in the text and place the detailed material in appendices.

Sometimes factual findings should be supported by specific citations to the record. If, for example, a factual determination is based on a single item of evidence, the transcript reference should be given; or if in a case the judge makes independent computations from the conflicting bases and theories of

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<sup>347</sup>This practice is, of course, common among the lower federal courts. See, e.g., *U.S. v. Hayles*, 492 F.2d 125 (5th Cir. 1974).

<sup>348</sup>*Capital Family Plan Case*, 26 CAB 8, 9 (1957).

<sup>349</sup>*Family Excursion Fares E-11867* (CAB, Oct. 11, 1957).

different parties, citations to the record should be included, showing the derivation of each computation. However, a determination on a major factual question frequently results from consideration of numerous items of testimony of varying weight. In such circumstances, excessive references to the record can be misleading to the reader. The substance of the decision must be anchored in the record, but the number and selection of citations to the record in some respects is a matter of style.

If the evidence is conflicting, but a finding essential, the judge may be tempted to compromise by using weak phrases such as "it appears" or "it seems." The judge should not try to evade responsibility in this fashion. A finding must be positive.

It may occasionally be desirable to quote directly from the transcript of the oral testimony. This device can be effective for emphasis, but should be used carefully. Long verbatim excerpts from the transcript may be unclear and prolix, and editing them for the opinion may lead to charges of selective quotation.

With respect to a sometimes-overlooked resource that is available to the judge, it is frequently advantageous to borrow directly from a brief--a document which is, after all, part of the record and drawn for the sole purpose of assisting the judge. If counsel has submitted an objective finding of fact or an articulate statement of law or policy with which the judge entirely agrees, it is wasted effort to recast it in other words. However, wholesale incorporation by reference of a party's entire brief and proposed findings, of course, ordinarily should be avoided.

It may sometimes be necessary for the decision to contain derogatory findings about a particular individual. If, for example, the testimony of a certain witness contradicts one of the findings, the judge may have to explain why the witness was not competent or credible. This should be avoided if possible without weakening the opinion; but if and when it is necessary, the criticism should be as mild as the integrity of the decision will permit. Similarly, if it is necessary to correct an error or refute an absurd argument, the name of the person responsible should be omitted if that will not impair the coherence of the decision. Although the judge should not needlessly offend or insult any person, the decision should be scrupulous in stating the facts accurately and clearly.

Where credibility is in issue the reviewing authority may look to the judge's demeanor findings on the theory that the judge observed the witness and therefore was in the best position to evaluate the witness' credibility. Consequently, the judge should exercise extreme care in such findings, and avoid conclusory statements such as "from the witness' demeanor it is concluded that the testimony cannot be believed." Instead, credibility findings should be supported by specific conduct or observations. For instance, a

witness may be talkative and comfortable in response to all questions, except those addressing the issue on which credibility is doubtful, but whenever the questioning turns to that issue, the witness becomes evasive and starts looking away from the judge and toward counsel, as if for signals. At any rate, to the extent possible, findings grounded on witness demeanor should have some reference point in observed behavior, such as evasiveness, hesitancy, or discomfort under questioning.

### C. Writing the Decision

The ability to conduct a hearing and decide a case fairly and accurately is crucial, but an inability to clearly and concisely explain the resulting decision impairs the value of all other aspects of the judge's performance. Writing is a difficult art, and despite high qualifications, writing experience, and training, a judge may sometimes have difficulty putting findings and thoughts on paper. Except for the fortunate few endowed with exceptional writing ability, each judge must constantly work on maintaining and improving this skill.

The inferior quality of much legal writing has inspired corrective action by many schools, writers, teachers, and critics. Some federal agencies have attempted to improve their written materials. See, for example:

U.S. Environmental Protection Agency, *Be a Better Writer* (1980).

U.S. Department of Housing and Urban Development, *HUD Handbook* 010.1, Chap. 5 and Appendix 3.

Congressional Budget Office, *A Style Guide for CBO: About Writing and Word Usage* (1984).

In addition, there are numerous excellent books on style and writing simple English. Some of special relevance to lawyers and judges are set out in Appendix III.

Legal writing need not be complex or confusing. Judge John M. Woolsey's opinion in the *Ulysses Case*,<sup>350</sup> familiar to many judges, is an example of clear judicial writing:

II. I have read 'Ulysses' once in its entirety and I have read those passages of which the Government particularly complains several times. In fact, for many weeks, my spare

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<sup>350</sup>United States v. One Book Called Ulysses, 5 F. Supp. 182 (S.D.N.Y. 1933).

time has been devoted to the consideration of the decision which my duty would require me to make in this matter.

'Ulysses' is not an easy book to read or to understand. But there has been much written about it, and in order properly to approach the consideration of it, it is advisable to read a number of other books which have now become its satellites. The study of 'Ulysses' is, therefore, a heavy task.

III. The reputation of 'Ulysses' in the literary world, however, warranted my taking such time as was necessary to enable me to satisfy myself as to the intent with which the book was written, for, of course, in any case where a book is claimed to be obscene it must first be determined, whether the intent with which it was written was what is called, according to the usual phrase, pornographic--that is, written for the purpose of exploiting obscenity. If the conclusion is that the book is pornographic that is the end of the inquiry and forfeiture must follow.

But in 'Ulysses,' in spite of its unusual frankness, I do not detect anywhere the leer of the sensualist. I hold, therefore, that it is not pornographic.

In writing on a difficult legal question involving a book written in an unconventional manner, Judge Woolsey's use of "I" is particularly striking. For a case of this type involving somewhat subjective standards the use of the first person makes his thinking clear. It emphasizes that this decision, the law, and the book, *Ulysses*, deal with human beings. The only legal words in the excerpt quoted are "I hold, therefore." The language used is clear and simple English, and it tells clearly what he did personally to reach his decision. The decision is four pages long. The complete opinion contains a few unusual words and several long ones, but the entire opinion and the reasons for Judge Woolsey's action are easily understood by a layman.

Most judges do not write with the elegance of Judge Woolsey. Sometimes, they simply do not have enough time to revise and rewrite. Nevertheless, they at least should strive to write simply enough so that anyone can understand them. Plain, simple English is more likely to convey a judge's findings to the reader than complicated legalistic phrasing.

Nothing suggested in this book will be sufficient to give any judge the smooth and clear legal writing ability to which all judges aspire. Nevertheless,

there are certain customs and patterns, which, if followed, can make the judge's decision shorter and easier to read.

Set out below, therefore, are several areas in which improvement is frequently needed. Study of this material can serve as a starting point for a judge seeking greater skill. No attempt is made to give a mini-course in writing or a review of grammar. This discussion deals primarily with matters of brevity, clarity, and stylistic quirks. Thorough discussions of these subjects and related matters of style and grammar will be found in books cited in Appendix III.

## 1. Brevity

### a. Needless Words

Strunk and White's *The Elements of Style* is a good place to start. This book of only 85 pages is filled with clear suggestions for making writing more readable. The authors, emphasizing that one should omit needless words, say: "A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell."<sup>351</sup>

### b. Short Simple Words

Long, cumbersome, and confusing words and phrases are used frequently by professional and business people including judges, lawyers, and teachers. There are, no doubt, numerous reasons for this tendency, such as a desire for precision, a desire to impress a client, or the tendency to use highly technical words even though one is writing for the layman.

Sometimes, the longer word or phrase is merely a short word lengthened unnecessarily--a kind of inflation. A classic example is substitution of *utilize* for *use*. Unfortunately, the tendency to *utilize*, rather than *use*, remains prevalent. A few examples of the "longer word" problem follow, but their number is legion.

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<sup>351</sup>William Strunk, Jr. & E. B. White, *THE ELEMENTS OF STYLE* 23 (3d ed. 1979).

Long

finalize  
 effectuate  
 preplan, plan ahead, plan in advance  
 point in time  
 at the present writing  
 are bound to be in agreement  
 in the not too distant future  
 have duly noted the contents of  
 to the fullest possible extent  
 along the lines of  
 regardless of the fact that  
 under circumstances in which  
 in reference to  
 in the event that

Short

finish, complete  
 effect  
 plan  
 time  
 now  
 agree  
 soon  
 have read  
 fully  
 like  
 although  
 when  
 about  
 if

Use the longer words or phrases only if the shorter ones will not do.

### c. Redundant Phrases

Lawyers habitually group two or more words meaning the same thing, such as *null and void*; *last will and testament*; *rest, residue, and remainder*; *transfer, convey, and pay over*; or *alter, change, or modify*. If a lawyer is trying to impress a client, well-known redundant phrases may be helpful, but even that is doubtful. Probably more clients are annoyed by needlessly repetitious language than are impressed by the use of stock phrases.

A judge needs only to explain to the readers--the parties and their attorneys, the agency, the interested public, and perhaps a reviewing court--what was done and why. A reader does not like words that confuse or words that are used for display. A reader wants only to learn with minimum time and effort what the judge said.

### d. Short Sentences

Long sentences are hard to understand. A timeless motto for writers is, "Short sentences can be read; long sentences must be studied."<sup>352</sup> The judge should state facts and reasons in terms easily understood by the layman as well

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<sup>352</sup>The revisor of the present edition cannot recall the source of this quotation, but reluctantly disclaims authorship.

as by the lawyer. By the use of a few connecting words with short sentences it is frequently easy to make the story flow evenly. Even if the use of simple words and short sentences in an opinion results in a little jerkiness that a stylist might avoid, little is lost so long as the meaning is clear.

Tests over a 7-year period show that the average sentence length in popular magazines has been kept between 12 and 15 words.<sup>353</sup> Although a judge may argue that a legal decision is more important and deals with deeper subjects than those in popular magazine articles, ease of reading and comprehension are surely as important in the documents that rule our lives as in those that entertain us.

Long sentences make writing hard to understand. The reader, either consciously or subconsciously, needs a break. Furthermore, one thought per sentence is easy to understand. Therefore, break up long sentences. Aim to keep average sentence length below 25 words. Try to separate a long compound sentence into two or more shorter sentences.

A related problem is the questionable connection of two sentences by the word *however*:

He was driving only 30 miles per hour, however, this was too fast.

One way to revise such a sentence:

He was driving only 30 miles per hour. This was too fast.

Occasionally thoughts are so interrelated that one sentence with several clauses and phrases may seem essential. However, if no matter how arranged it is still difficult to understand, then break up the sentence into three or four parts. Clarity is more important than stylish beauty.

Sometimes even breaking up a sentence or rewriting it does not clarify the meaning. The reason may be that the thinking is not sound or the facts are inconsistent. This applies not only to sentences but to paragraphs and even entire decisions. As Dean Landis said:

Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons on which they depend. . . .<sup>354</sup>

If a thought does not look right on paper, consider backing up for a rethinking or an entirely new approach. What you believe initially to be

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<sup>353</sup>R. Gunning, *TECHNIQUE OF CLEAR WRITING* 34 (1968).

<sup>354</sup>J. Landis, *THE ADMINISTRATIVE PROCESS* 105 (1938).

stylistic problems in expressing the idea or point actually may be symptoms of more basic defects in the substance of the idea or point.

### e. Paragraphs

Although a paragraph is used to group thoughts, there is no rigid rule for length of a paragraph. A paragraph may vary in length from a one word sentence to many sentences of substantial length and complexity.

Paragraph length should depend on what the writer is trying to communicate. Still, the writer needs to seek a balance between extremes. On the one hand, large blocks of print scare the reader. On the other hand, several short paragraphs in succession may be annoying. Most good paragraphs have between 2 and 10 sentences. If a paragraph seems too long, it is usually possible to divide it into two or more paragraphs without disturbing or distracting the reader.

## 2. Punctuation

Punctuation is the simplest device for making things easier to read. It is also an important road sign to the reader: *i.e.*, making it easier to understand the intended meaning of a passage. Punctuation can be used to emphasize, to clarify, and to simplify. Commas, semi-colons, periods, hyphens, dashes, and all the other punctuation symbols have specific purposes. If used correctly they will simplify writing and make your writing easier to read. Useful rules can be found in the U.S. Government Printing Office Style Manual,<sup>355</sup> and other grammar and style manuals. Rules vary somewhat, but reliance on any standard work should suffice to keep meanings clear and easy to understand.

## 3. Active or Passive Voice

Use of the active voice rather than the passive voice is frequently preferable for two reasons. First, it saves words:

The convict was sentenced by Judge Jones.

Judge Jones sentenced the convict.

Second, it is more likely to reveal who the actor is:

Drivers' licenses will be issued.

The clerk will issue drivers' licenses.

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<sup>355</sup>U.S. Government Printing Office, Rev. Ed. (1984).

In addition, the active voice is normally more direct and vigorous. The subject of the active-voice sentence is acting or doing something. Consequently, the active voice should be used in the absence of a good reason for using the passive.

This does not mean that the passive voice always should be avoided. To the contrary, passive may be preferable when the thing done is important and who did it is not, or when the actor is unknown or indefinite. The passive voice can also be used for emphasis, or when detached abstraction is desired.

#### 4. Ambiguity

Avoid the ambiguous. Like much advice, this is easier said than done. Often we do not realize that what we have said or written could be susceptible to more than one meaning: "This brief reads like a first draft dictated to a stenographer needing improvement." Sometimes we even refuse to see the ambiguity in our words when it is pointed out. At any rate, ambiguity slows and confuses the reader. It may even be used as a deliberate way to deceive.

Ambiguity may be especially likely when the writer uses a word with two meanings or two words with the same meaning near each other. For example, a lawyer or a judge should not use "exception," meaning an exclusion, in, or near, a sentence containing "exception" used as a legal term meaning a formal objection. (If this shortcoming occurs frequently in a piece of writing, it may be a clue that the piece is a first draft, possibly dictated to a machine or stenographer.)

When a writer deliberately uses, for the sake of "variety," two words meaning the same thing, the potential for ambiguity is no less. Problems resulting from deliberately using different words meaning the same thing, especially in the same passage of a decision or document, are discussed in the section on Elegant Variation.

In a related vein, some people cannot bear to repeat a name or proper noun anywhere near its original use. They feel somehow that they must use a pronoun. But sometimes the antecedent of a pronoun is not clear. If so, do not hesitate to strike the pronoun and use the name of the individual or object. Minor stylistic awkwardness is a small price to pay for avoiding major misunderstandings. A lapse in stylistic elegance is not as bad as creating the impression among your readers that you were completely oblivious to the meaning of what you had written.

After writing and rewriting a decision, a judge frequently becomes so familiar with its contents that it is difficult to detect ambiguous passages. It always helps to turn it over to a law clerk or an associate for a fresh look.

## 5. Stylistic Quirks

Avoid stylistic quirks. These small distractions divert the reader's attention from what is being said to how it is being said. The reader has enough distractions without the writer increasing them by efforts to be verbally eccentric or cute.

### a. Elegant Variation<sup>356</sup>

Elegant variation is the use of variety for its own sake--changing words and structure to hold the reader's attention and to avoid boredom. The following is an example:

The first *case* was *settled* for \$2,000, and the second *piece of litigation* was *disposed of out of court* for \$3,000, while the price of *amicable accord* reached in the third *suit* was \$5,000.<sup>357</sup>

But what has happened? The reader may wonder whether distinctions were intended between *case*, *piece of litigation*, and *suit*, and between *settled*, *disposed of out of court*, and *amicable accord*.

There are at least two ways, stylistically, to handle an elegant variation: (1) Repeat the same words or phrases. It is better to bore the reader than to confuse him. (2) Sometimes it is possible to put the repetitious material in an opening clause followed by two or more phrases or clauses that implicitly refer to the opening clause. For example, the sample sentence could be reworded as follows:

The first case was settled for \$2,000, the second for \$3,000, and the third for \$5,000.

Although breaking a document, or passage, into lettered or numbered divisions may sometimes confuse the reader, this procedure, used carefully, can frequently assist the reader. "The complainant has: (1) not filed a response to respondent's motion to suppress; (2) ignored repeated admonitions to conclude discovery by the agreed-upon date; (3) been late in every filing required by the agency's rules. . . ."

### b. Litotes

Some judges use litotes, affirmative statements expressed by denying the contrary, either as false courtesy to spare someone's feelings or to express a

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<sup>356</sup>H. Fowler, A DICTIONARY OF MODERN USAGE 148-151 (2d ed. E. Gowers 1965).

<sup>357</sup>Richard C. Wydick, PLAIN ENGLISH FOR LAWYERS 57 (Carolina Academic Press 1979).

doubtful finding. Avoid litotes unless they are clearly needed. Use *kindly* rather than *not unkindly*, *naturally* rather than *not unnaturally*. George Orwell recommended inoculation against using litotes by memorizing this sentence: "A not unblack dog was chasing a not unsmall rabbit across a not ungreen field."<sup>358</sup>

### c. Genderless English

Avoiding the appearance of gender-bias in writing is worthwhile, but requires some effort. Moreover, the effort can be overdone, especially if the writer resorts to creating new words, like substituting "personhole" for "manhole." However, a little good faith effort often can avoid passages like "the writer should know that his failure to demonstrate his sensitivity to gender-bias can result in his leaving an impression that he is totally ignorant about the way language conditions his behavior." Unfortunately, the writer may be in a no-win situation. If you use *his* for any pronoun, you may be criticized. *His or her* frequently sounds awkward, and substituting *their* may obscure the meaning.

At the very least, be aware of the problem. And certainly, be consistent in referring to males and females. If you refer to men by their last names or first names do the same with women. Try to omit irrelevant references to physical characteristics of either sex. Avoid patronizing and stereotypes. Do not say *fair sex*, *weaker sex*, or *the ladies*; say *women*. If you use *Esquire* on a service sheet, use it for all lawyers regardless of sex. Bias implicit in such phrases as *a manly effort* or *a weak sister* should be avoided. But don't overdo it by neutering everything in sight.

There are not always clear-cut answers to problems of gender and language, but so long as sex is irrelevant the judge should word the decision carefully to avoid any sexual bias.

## 6. Miscellaneous

### a. Names

If referring to a person or organization, set out the name in full the first time it is mentioned, followed by a word (or, where appropriate, an abbreviation or shortened title) in parentheses that identifies the person or organization. Thereafter use this term throughout the decision. Thus, do not assume that the reader is acquainted with the NLRB or AAA. (In fact, there could be several groups with the "AAA" initials.) Write out "National Labor

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<sup>358</sup>George Orwell, SHOOTING AN ELEPHANT AND OTHER ESSAYS 90.

Relations Board (NLRB)" the first time it is mentioned; treat the American Automobile Association similarly. If the names of persons or things are similar or confusing, the judge should devise short easily distinguishable names or descriptions.

Personal honorific titles such as Doctor, Professor, or General ordinarily should not be used if they are irrelevant. A party may infer that the judge is assigning some weight to the title.

#### b. Technical Terms

Technical terms are frequently necessary when dealing with many subjects. A judge who is familiar with the subject may tend to use complex and technical language incomprehensible to many persons interested in the decision. The judge should resist this tendency and, if possible, use words and expressions comprehensible to a lay reader. If that is impossible, unusual words and phrases should be defined. This can be done in a footnote or a special section for definitions. Alternatively, the judge may summarize in the main text and put the technical details and computations in an appendix.

#### c. Attribution

Excessive or needless attribution wastes a great deal of space, especially in judicial writing. As a consequence of realizing that anything in the written decision may have legal effect, the judge is tempted to overreact by repeating the source of every bit of information. There are several convenient devices for avoiding this problem. The judge may only need to state:

"Mr. X testified as follows:"

and continue with indirect quotations for a sentence, paragraph, or page without repeating the attribution.

The judge may place a summary of the testimony or statements of each witness under separate subheadings such as *Green's testimony* or *Smith's statement*.

Provided the result is clear, the judge may attribute the testimony early in the passage with no further reference until the last sentence, then say:

"Mr. Jones concluded his testimony by stating that. . . ."

#### d. Speech Tags

These are journalistic expressions such as *you said*, used to attribute direct quotations. Ordinarily, speech tags should not be placed in the middle of a

sentence. Also, a speech tag need not be repeated even for a long quotation. Once is usually enough.

#### e. Ellipsis

Ellipsis is the omission of a word or words that the reader will, by inference, understand or apply. It is frequently an easy way to avoid needless and boring repetition.

X bank has \$9 million in negotiable municipal bonds, Y bank \$7 million, and Z bank \$4 million.

Ellipsis is also used to shorten quotations by inserting three periods (four if the sentence is ended) for the omitted material.

#### f. Latin Terms

*Et al.*, an abbreviation for *et alii*, is Latin for *and others*. *Etc.*, an abbreviation for *et cetera*, is Latin for *and other things*. *And etc.* is redundant. *Et al.* may be useful in legal instruments to indicate persons whose names are not known, or for the names of parties too numerous to mention.

*Sic* is Latin for *so* or *thus*. It should be used only to ensure the reader that what is immediately preceding is correctly quoted when on its face it appears doubtful. It should never be used to criticize grammatical errors, or (in place of quotation marks) to indicate an ironical use of a word. *Sic* may be used to indicate that a misspelling in quoted material appears in the original.

### 7. Being Clever

Dr. Samuel Johnson reportedly said: "Read over your composition, and when you meet with a passage that you think is particularly fine, strike it out." Attempting to shine with cleverness is a good way to look foolish. Once more, cleverness is *not* the first priority of decision-writing. Judges, like all writers, on occasion will have an inspiration or perform a brilliant bit of stylistic acrobatics on some obscure point, that viewed a few days later no longer seems very brilliant.

The ideal is not demonstrated brilliance. The ideal lies in the opposite direction. The ideal is a decision that takes so little effort to read and understand that the reader becomes unaware of the writer.

### 8. Rewriting

The preceding suggestions of how the judge can simplify and clarify the written decision should be helpful. Judges may find that a good way to ensure

clarity and sound reasoning is to have an able colleague review, edit, and criticize the decision.

Finally, all judges know that the only way to write any document is to assemble the relevant material and the dictionary, thesaurus, stylebook, and guide to citations, and to write. Then rewrite, rewrite, and rewrite.<sup>359</sup>

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<sup>359</sup>For an excellent book that concentrates on the much-neglected topic of *how* to revise one's writing, see Ede, *WORK IN PROGRESS: A GUIDE TO WRITING AND REVISING* (St. Mary's Press, 1989).



## Appendices

Appendix I includes a number of forms which illustrate some of the devices described in the text. However, these forms are *not* meant to serve as a form book. They merely provide concrete examples of some of the devices described in the text (although they were adapted from documents used--at some time or other--in cases before various agencies.) Even for those agencies whose documents provided the models, each case in actual practice may require tailoring and departures from the example. Because they were simply examples of the devices described in the text, the forms in Judge Ruhlen's 1982 edition of the Manual remain valid today. Therefore, many of them were retained in this edition, largely unchanged. (Likewise, even though the U.S. Court of Federal Claims has changed its rules, Forms 18-a through 18-e, from the 1982 edition, remain excellent examples of matters discussed in the text.) Other forms in Appendix I have been adapted from orders or documents of more recent vintage, or from agencies other than those which were sources for the 1982 edition. Again, Appendix I is *not* a form book. In any event, current agency rules and practices would govern the drafting of orders or documents in particular cases.

Appendix II is a short bibliography of some works related to alternative dispute resolution.

Appendix III is a bibliography of trial manuals, style manuals, and works on writing.

Appendix IV is a general bibliography of materials relating to administrative adjudication.

Appendix V is a list of citations to the procedural rules of the various agencies which conduct hearings.

Appendix VI is a copy of the federal Administrative Procedure Act.



Order Scheduling Prehearing Conference, With Instructions

UNITED STATES OF AMERICA  
Agency  
Washington, D.C.

[Name of Case]

Docket No. \_\_\_\_\_

ORDER PRIOR TO PREHEARING CONFERENCE

The prehearing conference in this proceeding is scheduled for  [date] , commencing at 9:00 a.m.

IT IS ORDERED, that prior to the conference

(1) The parties shall attempt to achieve a settlement and shall report on their efforts at the conference, and

(2) Counsel are directed to explore the possibility of stipulating to facts and procedural matters.

IT IS FURTHER ORDERED, that at the conference counsel shall be prepared to discuss any relevant questions including:

*Pending Motions or Pleadings*

All questions relating to procedures governing the course of this hearing. Counsel will disclose any plans to file additional motions or pleadings and the relief to be sought.

*Discovery*

Discovery plans, procedures already started, current status, probable completion date, and deadlines, subject to the following guidelines:

(1) Discovery must be initiated no later than  [date]   
and

(2) Written interrogatories or depositions upon oral examination may be used, but not both in the absence of unusual circumstances.

### *Exhibits*

(1) The extent to which direct and rebuttal cases will be submitted in writing.

(2) Dates for exchange of exhibits.

(3) Preparation and organization of exhibits, including identification and numbering.

(4) The need for copies and the numbering of documents of which official notice is requested.

### *Witness Notification*

The date or dates on which each party will notify every other party of those witnesses it desires to cross-examine and the areas to be covered by such cross-examination.

### *Hearing Date and Place*

The date and place of the hearing most convenient to the parties.

[Date]

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Administrative Law Judge

**NOTE:** This order is adapted from a Federal Communications Commission order.

Form 1-b

**Order Scheduling Prehearing Conference**

UNITED STATES OF AMERICA  
 [Agency]  
 Washington, D.C.

[Name of Case]

Docket No. \_\_\_\_\_

**PRESIDING ADMINISTRATIVE LAW JUDGE'S ORDER  
 CONVENING PREHEARING CONFERENCE**

In accordance with the agency's order of \_\_\_[date]\_\_\_, a prehearing conference will be held at 10:00 a.m., \_\_\_[date]\_\_\_, in a hearing room at [place]\_\_\_, Washington, D.C. The parties are to be prepared to present discovery requests, to identify all outstanding issues, to stipulate to all factual matters not in dispute, and to propose a procedural schedule.

[Date]

\_\_\_\_\_  
 Administrative Law Judge

**NOTE:** This order is adapted from a Federal Energy Regulatory Commission order.

Form 1-c

## Letter to Unrepresented Party Confirming Prehearing Conference

Agency/ALJ Address

Addressee Address

Dear \_\_\_\_\_ :

This is to confirm my telephone call setting up a prehearing conference. As was indicated in our conversation, [I/the Administrative Judge] believe[s] such a conference will help expedite your case. He/She has asked me to conduct the conference with you.

The prehearing conference will be held on (Day of Week), (Full Date), at (Time) o'clock in Room \_\_\_\_ of \_\_\_\_\_ Building, (Number and Street, City, State) .

You should bring to the conference \_\_\_\_\_ (and) any additional evidence you wish to submit.

The time of this Conference has been set aside especially for you. If you are not able to attend at the scheduled time or if you decide that you do not wish to attend the conference, please call me at once at (telephone number) .

The purpose of this conference is (1) to clarify the factual data and issues in your case (and)/, (2) to determine if additional evidence is needed (./and ) . The conference will be informal and no testimony will be taken. Therefore you do not need to bring any witnesses with you.

If you have obtained, or are planning to obtain, an attorney or other individual to represent you in your (claim)/case please advise me at once.

Sincerely yours,

NOTE: This is adapted from a Social Security Administration letter.

Form 1-d

## Letter to Representative Confirming Prehearing Conference

Agency/ALJ Address

Addressee Address

Dear \_\_\_\_\_ :

This is to confirm my telephone call setting up a prehearing conference in the case of \_\_\_\_\_. As was indicated in our conversation, [I/the Administrative Judge] believe[s] such a conference will help expedite your client's case. [The Administrative Law Judge has asked me to conduct the conference with you.]

The prehearing conference will be held on (Day of Week), (Full Date), at (Time) o'clock in Room \_\_\_\_ of \_\_\_\_\_ Building, (Number and Street, City, State) .

You should bring to the conference \_\_\_\_\_ (and) any additional evidence you wish to submit.

The time of this Conference has been set aside especially for you. If you are not able to attend at the scheduled time or if you decide that you do not wish to attend the conference, please call me at once at (telephone number) .

The purpose of this conference is (1) to clarify the factual data and issues in your case (and)/ \_\_\_\_\_, (2) to determine if additional evidence is needed (./and ) . The conference will be informal and no testimony will be taken. Therefore you do not need to bring any witnesses with you.

You may wish to have your client accompany you to the conference.

Sincerely yours,

cc: claimant or others

**NOTE:** This is adapted from a Social Security Administration letter.

## Appearance Sheet

Form 2

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No. \_\_\_\_\_

PLEASE PRINT OR  
 WRITE CLEARLY

Date \_\_\_\_\_

## APPEARANCE SHEET

1. Applicant \_\_\_\_\_ Prospective Applicant \_\_\_\_\_

2. Person upon whom service is to be made (one person):

Full Name \_\_\_\_\_

Firm Name \_\_\_\_\_ Telephone: \_\_\_\_\_

Address \_\_\_\_\_ ZIP \_\_\_\_\_

Representing \_\_\_\_\_

3. Persons in addition to (2) above whose appearances are to be noted:

Full Name \_\_\_\_\_ Telephone: \_\_\_\_\_

Address \_\_\_\_\_ ZIP \_\_\_\_\_

Full Name \_\_\_\_\_ Telephone: \_\_\_\_\_

Address \_\_\_\_\_ ZIP \_\_\_\_\_

4. Number of copies of exhibits, pleadings, and other communications to be sent to the person in (2) above: \_\_\_\_\_ copies

5. Persons, in addition to (2) above, to whom exhibits, pleadings, and other communications are to be sent. In deference to each other and to minimize expenses, please limit requests to copies actually needed. A mailing list will be attached to the prehearing conference report.

Full Name \_\_\_\_\_ Copies \_\_\_\_\_

Address \_\_\_\_\_ ZIP \_\_\_\_\_

Full Name \_\_\_\_\_ Copies \_\_\_\_\_

Address \_\_\_\_\_ ZIP \_\_\_\_\_

Full Name \_\_\_\_\_ Copies \_\_\_\_\_

Address \_\_\_\_\_ ZIP \_\_\_\_\_

NOTE: This appearance sheet is adapted from standard forms used at the former Civil Aeronautics Board and at the Federal Communications Commission.

## GROUND RULES

Form 3

UNITED STATES OF AMERICA  
Agency  
Washington, D.C.

[Name of Case]

Docket No. \_\_\_\_\_

## GROUND RULES

1. *Evidence.* All evidence, including the testimony of witnesses, shall be prepared in written exhibit form and shall be served at dates designated by the Administrative Law Judge in advance of the hearing. Evidence as to events occurring after the exhibit exchange dates shall be presented by revision of exhibits.

Unless sponsorship is waived, witnesses cognizant of the exhibits shall be made available for cross-examination. Such witnesses shall have available at the hearing the work papers used in preparing their exhibits. Witnesses will not be permitted to read prepared testimony into the record.

The evidentiary record shall be limited to factual material. Argument will not be received in evidence but rather should be presented in the briefs.

2. *Exhibits Generally.* Information responses, exhibits, and written testimony shall be exchanged on prescribed dates prior to the hearing. Two copies shall be served upon the Administrative Law Judge and copies shall be sent to the parties in accordance with the attached mailing list. One of the Administrative Law Judge's copies is to be tabbed.

The exhibits shall include appropriate footnotes or narrative explaining the source of the information used and the methods employed in statistical compilations and estimates. Rebuttal exhibits shall refer specifically to the exhibits being rebutted.

Each party shall submit, prior to the hearing, lists of (a) its exhibits, appropriately indexed as to number and title, and (b) the witnesses sponsoring particular exhibits.

Where one part of a multi-page exhibit is based upon another part, appropriate cross-reference shall be made. For example, a profit-and-loss forecast based on detailed estimates appearing on other pages should contain specific references showing which pages support the different individual items of the forecast. Such exhibits shall be arranged in an organized manner in accordance with the party's theory of the case.

3. *Title of Exhibits.* The principal title of each exhibit should state precisely what it contains and may also contain a statement of the purpose for which the exhibit is offered. However, such statements will not be considered as part of the evidentiary record.

4. *Authenticity of Documents.* The authenticity of all documents submitted as proposed exhibits in advance of the hearing shall be deemed admitted unless written objection is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection. For example, absent objection, if an exhibit purporting to be a copy of a letter mailed on a certain date were submitted, it would not be necessary to prove such mailing or the accuracy of the copy.

#### HEARING

5. *Statement of Position.* Counsel for each party shall submit a statement of position before he presents his direct case. It shall include his theory of the case and such other material as directed by the Judge. This statement shall not be subject to cross-examination and shall not be received in evidence.

6. *Order of Presentation and Cross-Examination.* The order of presentation will be as follows, alphabetically within each category:

- (1) Civic Parties
- (2) Applicants
- (3) Industry Intervenors
- (4) Labor Parties
- (5) Governmental Agencies
- (6) Other Parties and Other Interested Persons
- (7) Agency Staff

Each party shall develop the hearing record on direct examination in logical order, and rebuttal shall be presented at the same time as the direct case. The order of cross-examination will be the same as for presenting direct cases unless the Judge deems some other order more appropriate.

7. *Requirement for Submission of Corrected Copies of Exhibits.* Each party shall present at the hearing three fully corrected sets of its exhibits received in evidence. The original is to be presented to the reporter, and ultimately will be transmitted to the agency for inclusion in the original docket. The other two copies are to be presented to the Administrative Law Judge, one for his use and the other for inclusion in the duplicate docket maintained by the agency.

8. *Cross-Examination.* Cross-examination, except by agency staff, shall be limited to the scope of the direct examination and to witnesses whose testimony is adverse to the party desiring to cross-examine. This is intended specifically to prohibit so-called "friendly cross-examination."

Second rounds of cross-examination normally will not be permitted. Cross-examination of any particular witness shall be limited to one attorney for each party.

9. *Motions.* Oral presentation on any motion or objection shall be limited to the party or parties making the motion or objection and the party or parties against whom the motion or objection is directed. Such presentations shall also be limited to one attorney for each party.

10. *Official Notice and Stipulation.* Parties using stipulated or officially noticed material shall refer to it by specific pages.

11. *Receipt of Evidence Without Sponsoring Witnesses.* Any party who believes he has evidence of a noncontroversial nature that is appropriate for receipt in evidence without the necessity of a sponsoring witness may present with his exhibit exchange time (1) an affidavit, by the persons who prepared the exhibits, to the effect that they were prepared by the witness or under his direction and are true and correct, and (2) a request that the exhibits be received in evidence without a witness at the hearing.

Any party who desires to cross-examine and therefore objects to such a request shall advise the requesting party in writing, with copy to the Administrative Law Judge, at least 10 calendar days prior to the hearing (5 calendar days in the case of rebuttal exhibits), specifying the witness or witnesses he intends to cross-examine. If no objections are received, the exhibit will be received without a witness at the hearing, subject, of course, to the right of objection on other grounds.

12. These rules are deemed consistent with the orderly conduct of this proceeding. Exceptions to any rule may be made by the Administrative Law Judge for good cause shown.

[Date]

---

Administrative Law Judge

**NOTE:** These rules are adapted from the standard rules used at the former Civil Aeronautics Board.

Form 4-a

## Prehearing Conference Report

UNITED STATES OF AMERICA

Agency  
Washington, D.C.

[Name of Case]

Docket No. 101

## PREHEARING CONFERENCE REPORT

Pursuant to notice a prehearing conference was held on \_\_\_\_\_ [date] and the following appearances were entered:

[Names of counsel and parties represented]

*Issues.* The agency on \_\_\_\_\_ [date] directed that this proceeding, which involves the question of whether A company or John Smith has acquired control of B Company and whether such control should be approved, be set for hearing on an expedited basis.

On \_\_\_\_\_ [date], A Company, B Company, and C Company filed an application requesting approval of the acquisition of control of B Company by A Company from C Company. This application was assigned Docket No. 102.

At the prehearing conference the Administrative Law Judge ruled that he would recommend that docket Nos. 101 and 102 be consolidated, and the conference was held on that basis.

*Requests for Information.* Several parties requested that specified information be submitted by one or more of the other parties. The parties agreed to circulate the material described in Appendix I.

*Material to be Stipulated.* A proposed stipulation listing material of general availability was circulated. A copy of that document will be attached only to the docket copy of this report, but not to any other copies since the proposed stipulation was distributed to counsel at the conference. Additional copies of the stipulation, if needed, may be obtained from agency staff.

It was agreed that the parties will be allowed until the date fixed for the submission of exhibits-in-chief to object to any item on the list or to suggest additional items. Otherwise the material will be considered to have been admitted by stipulation.

*Written Testimony.* Each party shall submit written or explanatory testimony with reference to its own exhibits at the time these exhibits are submitted. Rebuttal or surrebuttal testimony shall be submitted at the time fixed for submitting that type of exhibit.

*Ground Rules.* A proposed set of "ground rules" to be followed during subsequent stages of the proceeding was circulated. After some minor adjustments the Administrative Law Judge adopted the ground rules attached as Appendix 2.

*Dates for Subsequent Procedural Steps:*

Exhibits in Chief	_____
Rebuttal Exhibits	_____
Tentative Hearing Date	_____

[Date] \_\_\_\_\_  
 Administrative Law Judge

**NOTE:** This report is adapted from a former Civil Aeronautics Board report. The attachments are omitted.

Form 4-b

## Prehearing Conference Report

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No.

Issued:     [date]    Released:     [date]    

Pursuant to agreement reached at a prehearing conference held this date, IT IS ORDERED that the following schedule shall govern the initial course of this proceeding:

    [date]    

-Exchange of exhibits in regard to Issue 1 plus a list of any witnesses who will testify orally, including an indication of the nature of their proposed testimony.

    [date]    

-Notification of witnesses desired for cross-examination.

    [date]    

-Commencement of hearing re Issue 1.

At the conclusion of this phase of the proceeding, dates will be set for the hearing in regard to the comparative issue and whatever additional issues might by then have been added as a result of the pending petitions to enlarge issues.

---

 Administrative Law Judge

**NOTE:** This report is adapted from an order of the Federal Communications Commission.

Form 4-c

## Final Prehearing Conference Order

## FINAL PREHEARING ORDER

## Case Caption

A final prehearing conference was held in this matter, pursuant to Rule of the Commission's Rules of Practice for Adjudicative Proceedings ( \_\_ CFR ), on the-----day of-----, 19--, at----o'clock,--m.

Counsel appeared as follows:

For the Complainant:

For the Respondent(s):

Others:

1. Nature of Action and Jurisdiction. This is an action for----- and the jurisdiction of the Commission is invoked under United States Code, Title-----, Section-----and under the Code of Federal Regulations, Title-----, Section-----. The jurisdiction of the Commission is (not) disputed. The question of jurisdiction was decided as follows:

2. Stipulations and Statements. The following stipulation(s) and statement(s) were submitted, attached to, and made a part of this order:

(a) A comprehensive written stipulation or statement of all uncontested facts;

(b) A concise summary of the ultimate facts as claimed by each party. (Set forth the claimed facts, specifically; for example, if a violation is claimed, Counsel must assert specifically the acts of violation complained of; Counsel for each respondent must reply with equal clarity and detail.)

(c) Written stipulation(s) or statement(s) setting forth the qualifications of the expert witnesses to be called by each party;

(d) Written list(s) of the witnesses whom each party will call, written list(s) of the additional witnesses whom each party may call, and a statement of the subject matter on which each witness will testify;

(e) An agreed statement of the contested issues of fact and of law, or separate statements by each party of any contested issues of fact and law not agreed to;

(f) A list of all depositions to be read into evidence and statements of any objections thereto;

(g) A list and brief description of any charts, graphs, models, schematic diagrams, and similar objects that will be used in opening statements or closing arguments but will not be offered in evidence. If any other such objects are to be used by any party, those objects will be submitted to opposing counsel at least 3 days prior to the hearing. If there is then any objection to their use, the dispute will be submitted to the Presiding Officer at least 1 day prior to the hearing;

(h) Written waivers of claims or defenses which have been abandoned by the parties.

The foregoing were modified at the pretrial conference as follows:

(To be completed at the conference itself. If none, recite "none".)

### 3. Complainant's Evidence.

3.1 The following exhibits were offered by Complainant, received in evidence, and marked as follows:

(Identification number and brief description of each exhibit.)

The authenticity of these exhibits has been stipulated.

3.2 The following exhibits were offered by complainant, and respondent(s) (and party intervenors) the right to object to their receipt in evidence on the grounds stated:

(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)

#### 4. Respondent's Evidence.

4.1 The following exhibits were offered by the respondent(s), received in evidence, and marked as herein indicated:

(Identification number and brief description of each exhibit.)

The authenticity of these exhibits has been stipulated.

4.2 The following exhibits were offered by the respondent(s) and marked for identification. There was reserved to complainant (and party intervenors) the right to object to their receipt in evidence on the grounds stated:

(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)

#### 5. Party Intervenor's Evidence.

5.1 The following exhibits were offered by the party intervenor(s), received in evidence, and marked as herein indicated:

(Identification number and brief description of each exhibit.)

The authenticity of these exhibits has been stipulated.

5.2 The following exhibits were offered by the party intervenor(s) and marked for identification. There was reserved to complainant and respondent(s) the right to object to their receipt in evidence on the grounds stated:

(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)

**NOTE:** If any other exhibits are to be offered by any party, such exhibits will be submitted to opposing counsel at least ten (10) days prior to hearing, and a supplemental note of evidence filed into this record.

#### 6. Additional Actions. The following additional action(s) were taken:

(Amendments to pleadings, agreements of the parties, disposition of motions, separation of issues of liability and remedy, etc., if necessary)

7. Limitations and Reservations.

7.1 Each of the parties has the right to further supplement the list of witnesses not later than ten (10) days prior to commencement of the hearing by furnishing opposing counsel with the name and address of the witness and general subject matter of his/her testimony and by filing a supplement to this pretrial order. Thereafter, additional witnesses may be added only after application to the Presiding Officer, for good cause shown.

7.2 Rebuttal witnesses not listed in the exhibits to this order may be called only if the necessity of their testimony could not reasonably be foreseen ten (10) days prior to trial. If it appears to counsel at any time before trial that such rebuttal witnesses will be called, notice will immediately be given to opposing counsel and the Presiding Officer.

7.3 The probable length of hearing is---days. The hearing will commence on the----day of-----, 19---, at--o'clock--m. at -----.

7.4 Prehearing briefs will be filed not later than 5:00 p.m. on -----.  
(Insert date not later than ten (10) days prior to the hearing.) All anticipated legal questions, including those relating to the admissibility of evidence, must be covered by prehearing briefs.

This prehearing order has been formulated after a conference at which counsel for the respective parties appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing. It will control the course of the hearing, and it may not be amended except by consent of the parties and the Presiding Officer, or by order of the Presiding Officer to prevent manifest injustice.

\_\_\_\_\_  
Presiding Officer

Dated: \_\_\_\_\_

Approved as to Form and Substance Date: --

Attorney for Complainant --

Attorney for Respondent(s) --

Attorney for Intervenors --

**NOTE:** This order is adapted from Consumer Product Safety Commission, suggested form at 16 CFR §1025, Appendix I.

Form 5

## Interlocutory Order

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case] \_\_\_\_\_

Docket No. \_\_\_\_\_

## ORDER

Issued: [date]

Released: \_\_\_\_\_ [date]

Under consideration is a letter dated [date] from counsel for the Respondent, requesting that the hearing in this case be postponed to a date more convenient for counsel. The letter does not comply with agency rules and, apparently, the required filing with the agency's secretary was not made. Nevertheless, consideration will be given to the merits of the request.

The letter arrived in this office on [date], the day after exhibits and witness lists were due and nearly a month after the order scheduling this case for hearing. Moreover, the Agency Bureau has now filed and served the Respondent with the exhibits for the proceeding. (The Respondent has not indicated whether he will present witnesses or exhibits.) To delay further a hearing would be a disservice to all parties, and inefficient use of the agency's resources, and would not serve the public interest.

IT IS ORDERED that the request to postpone the hearing BE DENIED.

\_\_\_\_\_  
 Administrative Law Judge

NOTE: This order is adapted from a Federal Communications Commission order.

Form 6-a

## Prehearing Conference Instructions

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No. \_\_\_\_\_

## ORDER PRIOR TO PREHEARING CONFERENCE

Issued: \_\_\_[date]\_\_\_

Released: \_\_\_[date]\_\_\_

A prehearing conference and a hearing are scheduled to begin at \_\_\_[place]\_\_\_, on October 12, 1982, at 10:00 a.m.

To prepare for the hearing IT IS ORDERED that the parties comply with the five following subparagraphs:

(1) On designated issues (b) and (c), Bureau counsel will prepare and serve on the other parties and the Presiding Officer a document that specifies the reasons those issues were included in the designation order. See \_\_\_CFR \_\_\_ . This document will be served on or before August 24, 1982.

(2) On designated issues (b) and (c), both the burden of proceeding and the burden of proof have been placed on A Company. On or before September 7, 1982, A Company will serve on all other parties and the Presiding Officer any written documents it intends to rely on in support of its direct case, and a list of the witnesses (names and addresses) who will testify regarding those two issues.

(3) On issues (a)(1) through (7), each applicant is responsible for presenting the required information about its own proposal.

(4) On issues (a)(2) through (7), each applicant will reduce the essential facts to writing and present that material as an exhibit at the hearing. That exhibit will be accompanied by the affidavit of the witness or witnesses who prepared the material and who may be cross-examined on it.

(5) All written materials referred to in paragraphs (3) and (4) supra will be exchanged with all the other parties and the Presiding Officer on or before September 7, 1982.

\_\_\_\_\_  
 Administrative Law Judge

**NOTE:** This order is adapted from an FCC order.

Form 6-b

Prehearing Conference Order/Instructions  
("Simple" case)

UNITED STATES OF AMERICA  
Agency

[ADDRESS]

[Name of Case]

Docket No. \_\_\_\_\_

NOTICE OF CONFERENCE AND HEARING

This case is noticed for conference to be immediately followed by hearing. Said conference/hearing to be held on \_\_\_\_\_, at \_\_\_\_\_. [The parties will be notified later as to the exact location of the hearing.]

Parties or their representatives are required to be present unless previously excused by the undersigned Judge. Failure to appear will be considered a cause for dismissal and entry of judgment.

Prior to the date of the conference, the parties shall confer regarding: (1) possible settlement; (2) possible stipulations or admissions; (3) the narrowing of issues; (4) defenses; (5) witnesses and exhibits; (6) motions; (7) an agreed statement of issues and facts; and (8) any other pertinent matters.

At the conference, the parties shall be prepared to report on settlement efforts and all other matters which will tend to simplify the issues and expedite the proceedings. Hearing will proceed immediately upon the conclusion of the conference.

If a settlement has been agreed to, even though not yet executed, and the undersigned Judge has been timely advised, it may be unnecessary for the parties to attend this conference/hearing.

[The respondent shall post and/or serve a copy of this notice in accordance with Rule \_\_\_ of the [Commission's] Rules of Procedure. Failure

of the respondent to do so may be considered as grounds for dismissal of respondent's notice of contest.]

[Employees or their representatives wishing to take part in these proceedings as a party may do so by filing notice of their determination to do so at least ten (10) days before the date set for hearing. See [§29 CFR \_\_\_]

\_\_\_\_\_  
Administrative Law Judge

Date:

**NOTE:** This notice is adapted from an Occupational Safety and Health Review Commission ALJ's notice.

Form 6-c

Prehearing Conference Order/Instructions  
("Simple" case)

UNITED STATES OF AMERICA  
Agency

[ADDRESS]

[Name of Case]

Docket No.

ORDER REQUIRING PARTIES TO MEET  
PURSUANT TO [SIMPLIFIED PROCEEDINGS]

This matter is before the undersigned for simplified proceedings pursuant to CFR §.

It is hereby ORDERED:

That the parties meet and confer within twenty (20) days after receipt of this Order.

The following matters shall be discussed:

1. Settlement of the case.
2. Narrowing the issues.
3. Agreed statement of the issues and facts.
4. Defenses.

5. Witnesses and exhibits.
6. Motions.
7. Any other pertinent matter(s).

It is further ORDERED that within twenty-five (25) days of receipt of this order, the parties shall report the results of their discussions to the undersigned Judge. Upon receipt of this report, unless the case is settled, the undersigned shall schedule and preside over a conference/hearing at an early date.

---

Administrative Law Judge

Date: \_\_\_\_\_.

Copies to:

**NOTE:** This order is adapted from an Occupational Safety and Health Review Commission ALJ's order.

Form 7

**Order Granting Permission to Appeal  
Interlocutory Ruling**

UNITED STATES OF AMERICA  
Agency  
Washington, D.C.

[Name of Case]

Docket No.

ORDER GRANTING PERMISSION  
TO FILE APPEAL FROM INTERLOCUTORY RULING

SERVICE: [List of names and addresses of all parties and counsel]

On \_\_\_\_\_ [date] \_\_\_\_\_ agency staff submitted a request for (1) reconsideration or, in the alternative, (2) permission to file an appeal from an interlocutory ruling, dated \_\_\_\_\_.

In view of the extraordinary circumstances involved, I consent to the appeal of my ruling on agency staff's motion to dismiss, in accordance with Section \_\_\_ of the agency's Rules of Practice, \_\_\_\_\_ CFR \_\_\_\_\_. An agency ruling at this point on the question of the application of res judicata in cases where the passage of time is a factor, as contrasted with a ruling after a full hearing in the matter is completed, is in the public interest and is necessary to prevent substantial detriment to the public interest and the parties.

The parties shall have thirty (30) days in which to brief the question presented in the appeal to the agency.

\_\_\_\_\_  
Administrative Law Judge

[Date]

**NOTE:** This form is adapted from a National Transportation Safety Board order.

Form 8-a

## Administrative Law Judge's Questions

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of case]

Docket No. \_\_\_\_

## ADMINISTRATIVE LAW JUDGES' QUESTIONS

Counsel for the agency and for the respondents are directed to answer and present argument on the following questions. Responses shall be in writing and served by \_\_\_\_ [date] \_\_\_\_.

1. What does the legislative history indicate were all the reasons for adopting the requirement of Presidential approval of the regulations? Give all specific references. Was there discussion of a need for uniformity prior to [date] \_\_\_\_ when Congressman \_\_\_\_\_ introduced this proposal?

2. Section \_\_\_\_ of the Act originally provided that each agency should take action to effectuate the provisions of section \_\_\_\_ and that such action may be taken by rule or regulation or order of general applicability. This was later amended to a direction to effectuate section \_\_\_\_ by issuing rules, regulations, or orders of general applicability. Why was this change made? Give all specific references. Was this change made after \_\_\_\_ [date] \_\_\_\_? If so, does it affect the argument on page 17 of the brief of the agency that there was no suggestion that all major issues must be resolved by regulation, and that the agencies (not the President) would have a good deal of discretion?

Counsel for respondents are invited to answer the questions previously addressed to the agency by the notice of \_\_\_\_ [date] \_\_\_\_.

\_\_\_\_\_  
Administrative Law Judge

[Date] \_\_\_\_

Copies to all parties

NOTE: These questions are adapted from questions used in a Department of Health and Human Services proceeding.

Form 8-b

**Administrative Law Judge's Letter to Expert Witness**

Dear [Dr.] \_\_\_\_\_:

This letter is a request for your professional opinion in connection with \_\_\_\_\_'s disability claim, which is now before me for a hearing and decision.

Enclosed is a proposed exhibit, \_\_\_\_\_, which summarizes your professional qualifications. If necessary, please correct or complete the form to accurately reflect your professional qualifications, and return the original to me. The copy is for your files.

Also enclosed are copies of pertinent evidence for your consideration. Based on your professional knowledge and the information provided, please furnish written answers to the enclosed interrogatories. If additional space is needed, you may use the reverse side of the interrogatories or attach additional pages. A copy of this letter and the completed interrogatories will be made a part of the record of the proceedings in this case.

Submit your charges for this service in accordance with your Blanket Purchase Arrangement with the Department of \_\_\_\_\_. Sign the enclosed Contractor's Invoice and return it to me, along with the completed interrogatories, the evidence, and the other documents, as soon as possible, but no later than \_\_\_\_\_ (date). For your convenience, I am enclosing a postage-paid, self-addressed envelope.

Sincerely yours,

Administrative Law Judge

cc: (claimant or representative)

**NOTE:** This form is adapted from a letter used by the Social Security Administration.

## Form 8-c

**Administrative Law Judge's Interrogatories to Expert**

Individual:

SSN:

Claim for:

1. Please state your full name and address.
2. Is the attached curriculum vitae a correct summary of your professional qualifications?
3. Are you board-certified in any medical field and, if so, which field?
4. Are you aware that your responses to these interrogatories are sought from you in the role of an impartial (medical) (vocational) (other) expert?
5. Has there been any prior communication between the Administrative Law Judge and yourself regarding the merits of this case?
6. Have you ever personally examined the claimant?
7. Have you read the medical data pertaining to the claimant we furnished you?
8. Is there sufficient medical evidence of record to allow you to form an opinion of (the claimant's medical status) (other)?  
If not, what other evidence is required?
9. Please list the claimant's physical and/or mental impairments resulting from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques. In addition, please state your opinion as to the severity of each impairment, and the exhibits and objective findings which support your opinion.
10. Are there any conflicts in the medical evidence of record which affected your opinion and, if so, please state how you resolved them?
11. Have we furnished you with copies of the pertinent section of the Listing of Impairments, Appendix I, Subpart P, Social Security Regulations, No. \_\_?

12. In your opinion, do any of the claimant's impairments, when taken individually, meet the requirements of any of the listed impairments? Please fully explain this answer. . . .

13. . . .

. . . .

20. Do you have any additional comments or information which may assist us in reaching a decision? If so, please state.

**NOTE:** This form is adapted from a form used by the Social Security Administration.

Form 8-d

**Letter Sending Interrogatories  
to Claimant or Representative**

Dear \_\_\_\_\_:

This refers to Mr./Mrs./Ms./your claim for disability benefits. I have determined that it is necessary to obtain further evidence from a/an medical/other expert. I proposed to do this by requesting a/an medical/other expert to review the file and to answer written interrogatories/questions about your claim.

I am enclosing the interrogatories/questions that I propose to submit to the expert. You may:

- object to any of the questions;
- propose other questions; or
- object to my obtaining this information by means of interrogatories/questions.

If I revise the interrogatories/questions based on your comments, I will give you another opportunity to comment on the revised interrogatories/questions. I will also send you a copy of the expert's responses. You may then:

- comment on the responses to the interrogatories/questions;
- submit more evidence; or
- ask me to submit additional interrogatories/questions to the expert.

If you object to my sending interrogatories/questions to an expert, you may request that I obtain the evidence at a supplemental hearing.

If I do not receive a response from you within 20 days from the date of this letter, I will assume you have no objections and no additional interrogatories/questions. I will then send the enclosed interrogatories/questions to the expert.

Please contact me if you have any questions on this procedure.

Sincerely yours,

Administrative Law Judge

**NOTE:** This form is adapted from a letter used by the Social Security Administration.

Form 8-e

**Letter Sending Revised Interrogatories to Claimant or Representative**

Dear \_\_\_\_\_:

In response to your comments of \_\_\_\_\_ date \_\_\_\_\_, I have revised the interrogatories/questions that I originally proposed to submit to a/an medical/other expert. I am enclosing the revised interrogatories/questions.

If you have any further comments, please send them to me within 10 days from the date of this letter. After that time, I will request an expert to respond to the interrogatories/questions.

Sincerely yours,

Administrative Law Judge

**NOTE:** This form is adapted from a letter used by the Social Security Administration.

## Form 8-f

Letter Proffering the Responses to the Interrogatories  
to the Claimant or Representative

Dear \_\_\_\_\_:

This refers to [Mr./Mrs./Ms. \_\_\_\_\_'s] [your] claim for disability benefits. I have received responses to the [interrogatories/questions] I submitted to , a \_\_\_\_\_ expert. I have enclosed a copy of those responses and a statement of \_\_\_\_\_'s professional qualifications.

Please review this material carefully. You may:

- submit a written statement of the facts and law in this case, including any comments you wish to make on the expert witness' responses; or
- request that the expert witness answer further [interrogatories/questions]; or
- \_\_\_\_\_.

If you wish to question the expert witness at a [supplemental] hearing, you may so request. If you so request, I will schedule a [supplemental] hearing and will notify you of the time and location of the hearing.

If I do not receive a response from you within 20 days from the date of this letter, I will conclude that you have no additional [interrogatories/questions] and that you do not wish to submit anything further. Also, I will accept into the record as additional evidence the questions to the expert, the expert's responses, and the statement of the expert's professional qualifications, and issue a decision.

Sincerely yours,

Administrative Law Judge

Enclosures  
[cc: claimant/others]

**NOTE:** This form is adapted from a letter used by the Social Security Administration.

Form 9

## Intervention Order

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No.

ORDER GRANTING, DENYING,  
 AND DISMISSING PETITIONS TO INTERVENE

Petitions to intervene were filed before May 10, 1982, by A Company, B city, C City, D City Airport commission, and E Association International. The hearing commenced May 10, 1982.

A Company provides service to points at issue herein. As such, therefore, it may be affected by any order that may be entered, and its interest may not be adequately represented by existing parties.

Cities B and D now receive service pursuant to route authorizations that are at issue herein. Each, therefore, may be affected by any order that may be entered and its interest may not be adequately represented by existing parties.

The petitioning labor organization E represents employees of carriers whose route authorizations are proposed for modification and/or change herein. It, therefore, may be affected by any order that may be entered and its interest may not be adequately represented by existing parties.

No proposal for modifying the air service authorized to C City is included among the issues in this proceeding and, consequently, any interest C City may have is too remote to justify intervention.

Pursuant to authority delegated by the agency in its regulations, it is found that each petitioner, except C City, has a sufficient economic interest in this proceeding to justify its participation as a party.

By petition filed August 2, 1982, F City seeks to intervene. The agency's Rules of Practice require filing of a petition to intervene by a city, other public body, or a chamber of commerce not later than the last day prior to the beginning of the hearing. This rule provides that a petition that is not

timely filed shall be dismissed unless the petitioner shall clearly show good cause for the failure to file on time.

In support of its contention that there is good cause for failure to file the petition until this late date, the petitioner asserts failure to receive notice of the pendency of the proceeding. The notice of hearing was published on April 1, 1982 (\_\_\_Fed. Reg. \_\_\_). Moreover, official notice is taken that the pendency of this proceeding has also been widely covered in the press, including trade and business magazines and publications.

Pursuant to authority delegated by the agency in its regulations, CFR\_\_\_\_\_, it is found that the petitioner has not clearly shown good cause for failure to file its petition on time.

ACCORDINGLY, IT IS ORDERED:

1. That all of the above petitions to intervene, except that of C City and F City, are granted.
2. That the petition of C City to intervene is denied.
3. That the petition of F City is dismissed.

Persons entitled to petition the Board for review of this order pursuant to the agency's regulations, \_\_\_CFR\_\_\_\_\_, may file such petitions within ten days after the date of service of this order.

This order shall be effective and become the action of the agency upon expiration of the above period unless before that date a petition for review is filed, or the agency gives notice that it will review this order on its own motion.

---

Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This form is adapted from several orders issued by the former Civil Aeronautics Board.

Form 10-a

## Notice of Hearing

UNITED STATES OF AMERICA  
Agency  
Washington, D.C.

## NOTICE OF HEARING

PLEASE TAKE NOTICE that the hearings in docket Number \_\_\_\_, will commence at 10:00 a.m. on \_\_\_\_ [date] \_\_\_\_, in Room \_\_\_\_, Federal Building, \_\_\_\_ [city and state] .

For information concerning the issues involved and other details in this proceeding, interested persons are referred to the prehearing conference report issued on \_\_\_\_ [date] \_\_\_\_ and other documents which are in the docket of this proceeding on file in the Docket Section of the Agency.

\_\_\_\_\_  
Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This notice is adapted from a Federal Reserve System notice.

Form 10-b

## Notice of Hearing

UNITED STATES OF AMERICA

Agency  
Address

Caption

## NOTICE OF HEARING

A hearing will be held in the above matter on August 29, 1988, at 9:30 a.m. at/in [full address, including where relevant the name of the building (e.g., New Courthouse Building, city, state). Please report to [clerk's office, first floor, for information regarding room number] [other purposes].

Pursuant to section 9(b) of the Occupational Safety and Health Act and section [ ] of the Commission's Rules of Procedure, the respondent is hereby required to serve and/or post this Notice of Hearing in order to afford affected employees or their representatives an opportunity to participate as parties during this proceeding.

Affected employees/others are entitled to participate in this hearing under terms and conditions established by the Occupational Safety and Health Review Commission in its Rules of Procedure.

Notice of intent to participate should be sent to:

[Full address of administrative law judge/agency/or other addressee, as appropriate]

---

 Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This notice is adapted from an Occupational Safety and Health Review Commission ALJ's notice.

Form 11

**Request by Judge for a Person to Appear as a Witness**

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

Date

Re: [Name of Case]  
 [Name and Address]

Docket No.

Dear Sir:

The agency is holding a proceeding involving the reclassification of mail. The issue is the possible development of a new system of classification based on the technological capabilities that may reasonably be attained in the near future. For example, do machines exist that can read and sort mail? When are such machines likely to be available? What are the practical and financial problems involved in using such machines?

I request that you, in your capacity as a knowledgeable and concerned private citizen, appear and testify on this matter at any agency hearing to be held at     [place]    , Washington, D.C. at 10 a.m., Thursday,     [date]    .

Rules of this agency prevent your discussing your testimony with me outside of the hearing.

Sincerely,

Administrative Law Judge

**NOTE:** This letter is adapted from a Postal Rate Commission letter.

Form 12

## Presiding Judge's Instructions for Briefing

UNITED STATES OF AMERICA  
Agency  
Washington, D.C.

A-B Merger Case

Docket No.

## PRESIDING JUDGE'S INSTRUCTIONS FOR BRIEFING

An examination of the record discloses certain novel or legal problems that were not fully covered in the factual record or arguments of the parties during the hearing. Consequently, to expedite the decision the following specific matters shall be briefed.

## 1. Subsidy Eligibility

Each of the applicants is now receiving subsidy and it is possible, if the merger is approved, that the surviving carrier will be entitled to subsidy in an amount to be determined by the agency. The applicants request that the merger issues should be decided at once and that, if the merger is approved, determination of the amount of the subsidy, if any, be deferred for decision in another proceeding. The agency, on the other hand, contends that decision on the merger should be deferred pending decision on subsidy needs in an ancillary rate proceeding.

The applicants and the agency are requested to include arguments on this matter in their brief.

## 2. Labor Protective Conditions

Historically, the agency has in merger cases used the labor protective conditions adopted in X Case in 1952 and reaffirmed in Y Case in 1979. (These conditions are based on those included in the Washington Job Agreement of May 21, 1936.)

The applicants request that the same conditions be imposed if the merger is approved. The C Union, in light of changed economic conditions,

requests that the agency reexamine the labor protective conditions and make such changes as it finds needed.

The applicants, the C Union, and the agency are requested to include arguments on this matter in their briefs.

Briefs shall be submitted 10 days after the close of the hearing. Reply briefs will not be permitted.

---

Administrative Law Judge

[Date] \_\_\_\_\_

Form 13

## Order Correcting Transcript

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No.

## ORDER CORRECTING TRANSCRIPT

Issued: \_\_\_\_\_ Released:

Under consideration are a motion to correct transcript filed by A on  
 [Date] and on opposition filed by B on [Date] .

A's motion requests that references to section 21.505 of the Rules that are found on page 167, line 25 and on page 168, line 6 of the transcript be changed to section 21.504. Accompanying A's motion is an affidavit of C, consulting engineer, indicating that upon reviewing his testimony he discovered these typographical errors.

The references in question appear in the testimony of the witness C, and refer to a series of propagation curves actually set forth in section 21.504.

B's contention that A's motion is an attempt to change C's testimony is unsound. It is obvious that the reference to section 21.505 rather than section 21.504 is a typographical error.

In order that the agency may have an accurate record before it, IT IS ORDERED that A's motion IS GRANTED and the transcript IS CORRECTED as proposed.

---

 Administrative Law Judge

NOTE: This order correcting transcript is adapted from an order of the Federal Communications Commission.

Errata Sheet

Form 14

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No.

## ERRATA SHEET

INITIAL DECISION OF THE  
 ADMINISTRATIVE LAW JUDGE  
 (Issued \_\_\_\_\_)

1. On page 4, paragraph 2, line 7, change "\$74,936" to "\$74,936,000".
2. On page 7, paragraph 2, line 38, change "\$21,401" to "\$21,401,000".
3. On page 9, paragraph 2, line 3, between the words "can" and "exceed" insert the word "not".
4. On page 14, second quote, line 12, change "employer" to "employee".
5. On page 14, last paragraph, line 11, change "yards" to "meters".
6. On page 16, last paragraph, line 1, change "is dismissed" to "is denied".

\_\_\_\_\_  
 Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This errata sheet is adapted from one used by the Federal Energy Regulatory Commission.

Form 15

## Certification of a Record to an Agency

UNITED STATES OF AMERICA  
Agency  
Washington, D.C.

[Name of Case]

Docket No.

PRESIDING ADMINISTRATIVE LAW JUDGE'S  
CERTIFICATION OF THE RECORD  
ACCOMPANYING INITIAL DECISION

## TO THE SECRETARY:

In accordance with the provisions of Section \_\_\_ of the Commission's Rules of Practice and Procedure, I hereby certify:

I. That the following constitutes the record of the hearing in this proceeding:

(1) The official stenographer's report of the hearings held on October 5 through 8, 1982, consisting of volumes numbered 1 through 5, pages numbered 1 through 715, including errata.

(2) Exhibits numbered 1 through 16, which are described on the various index pages of the official stenographer's report. All exhibits were admitted into evidence.

(3) Items A through G, which are described on the various index pages of the official stenographer's report.

II. That, in accordance with Section \_\_\_ of the Rules of Practice and Procedure, the attached document, dated \_\_\_\_, is my Initial Decision in this proceeding.

---

 Presiding Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This certification of a record is adapted from one used at the Federal Energy Regulatory Commission.

Form 16

## Order Admitting Exhibit into Evidence

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No.

## ORDER ADMITTING EXHIBIT INTO EVIDENCE

Pursuant to the Judge's request at the hearing, A city has submitted its rate contract with X Power Company to the Judge and all parties. This contract, dated \_\_\_\_, is marked A exhibit 1 for purposes of identification.

It appears that the document is relevant to the issues and is received into evidence.

Any party wishing to object to the admission of this document into evidence should submit its objections in writing and hand deliver them to the Presiding Judge on or before \_\_\_\_ [date] \_\_\_\_. If any objections are received, the Presiding Judge will reconsider the action taken in this order and issue a further order dealing with the objections.

SO ORDERED.

---

 Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This order is an adaptation of one issued by the Federal Energy Regulatory Commission.

Form 17

## Order Setting Oral Argument

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No.

## ORDER SETTING ORAL ARGUMENT

By motion filed     [date]     X Company sought an order allowing the Company access to certain documents in the files of Agency Staff. Agency Staff filed a response in opposition on     [date]    . X Company seeks oral argument on this matter. Oral argument regarding production of the date in question will be heard at 10:00 a.m. on     [date]     in a hearing room of this Agency,

    [place]    , Washington, D.C. Other procedural dates will also be set at that time.

---

 Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This order is adapted from one used by the Federal Energy Regulatory Commission.

**Inquiry re Further Proceedings**

IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
TRIAL DIVISION

No.

(Dated:

	)
_____	)
	)
_____	)
	)
v.	)
	)
	)
The United States	)

Since issue has now been joined, this inquiry is made to determine what steps should henceforth be taken to expedite the disposition of this case.

If a trial is to be held, normal procedure calls for the issuance of a Standard Pretrial Order on Liability under which the parties are required to submit to each other (with plaintiff making the first submission) statements setting forth the facts which they believe are not in dispute, the issues of fact and law as they perceive them to be, the exhibits they propose to introduce into evidence, and the witnesses whose testimony they propose to take, together with an indication of the issues to which the testimony of each witness will relate.

However, if the parties contemplate the disposition of the case by means other than a trial, it may not be necessary to invoke such formal pretrial procedures. For instance, if the parties will proceed by a dispositive motion (such as a motion for summary judgment), or if they intend to stipulate all of the material facts (assuming the case lends itself to such a stipulation), or if they propose to dispose of the case by way of a settlement, the issuance of the Standard Pretrial Order may be withheld. In some cases, where justified, the issuance of the Order may be postponed pending the completion of necessary discovery proceedings (see Rule 71(a)).

Accordingly, in order that a determination may be made concerning the nature, extent and timing of further proceedings, counsel for each of the parties is directed to respond to this Inquiry (by letter, with a copy to opposing counsel) within \_\_\_ days, by advising whether [s]he presently intends (1) to file a dispositive motion; (2) to undertake a stipulation of all of the facts (experience has indicated that such a stipulation sometimes evolves more expeditiously as a result of complying with the Standard Pretrial Order); (3) to initiate settlement negotiations; or (4) to engage in such discovery proceedings as would, in counsel's opinion, justify the postponement of the Standard Pretrial Order until the completion of such proceedings.

If either counsel intends to pursue one or more of the above courses of actions, the response should be accompanied by a request for a deferral of the issuance of the Standard Pretrial Order for a stated reasonable time, and upon condition that within such time counsel will pursue the indicated courses of action.

---

Trial Judge

Form 18-b

**Pretrial Instructions**

UNITED STATES COURT OF FEDERAL CLAIMS  
717 Madison Place, N.W.  
Washington, D.C. 20005

**PRETRIAL INSTRUCTIONS**

The accompanying pretrial order is issued with a view to securing just and inexpensive determination of litigation, without unnecessary delay; it is designed to explore:

- (a) simplification and clarification of the issues;
- (b) the possibility of obtaining stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements which will avoid unnecessary proof;
- (c) limitation of the number of expert or other witnesses, and avoidance of cumulative evidence, should the case go to trial;
- (d) the possibility of agreement disposing of all or any of the issues in the case; and
- (e) such other matters as may aid in the disposition of this litigation.

In following the instructions contained in this order, counsel should bear these purposes in mind. Your full cooperation is essential if pretrial proceedings are to be effective. Time spent on thorough pretrial not only saves an equivalent or greater period of time during the course of the trial for the court, counsel, and witnesses, but reduces costs.

Counsel are therefore asked to approach their respective obligations in a genuine and sincere spirit of cooperation, both in the preparation of their submissions, and in their assessment of and comment on submissions of opposing counsel. Settlement possibilities should be thoroughly and conscientiously assessed, without unduly delaying the pretrial procedures. The possibility of voluntary disclosure of discoverable information should be explored before resort is had to compulsory process. The latter, if required, is to be initiated without delay and concluded prior to response to the pretrial order.

With the full cooperation of counsel, it should not be necessary to impose the sanctions provided by Rule 114(b) for failure or refusal to comply with the requirements of the pretrial order.

---

Trial Judge

Standard Pretrial Order on Liability

IN THE UNITED STATES COURT OF FEDERAL CLAIMS  
TRIAL DIVISION

No.

(Filed: )

	)	
(Rule 111)	)	
Plaintiff*	)	
	)	Standard
v.	)	Pretrial
	)	Order on
	)	Liability
The United States	)	
Defendant	)	

IT IS ORDERED as follows:

1. Plaintiff's Submission. On or before \_\_\_\_\_19\_\_\_\_, the plaintiff\* shall furnish the following to the attorney of record for the defendant and to the trial judge:

(a) A list accurately describing the documents that are relied on and are to be offered in evidence. The documents shall be numbered; and the list shall be accompanied by a copy of each document referred to therein, except that (1) no copy need be supplied to defendant's counsel where the plaintiff reasonably believes that the defendant already has the original or a copy, and (2) the trial judge need not be provided a copy of any exhibit unless its admissibility is put in issue.

(b) A statement of the material matters of fact as to which it is believed that there is no substantial controversy between the parties, or which have been agreed to by the parties. The paragraphs of this statement shall be numbered.

(c) A memorandum of contentions of fact and law, which shall comply with the following requirements:

- (1) The contentions of fact shall consist of a concise statement of the ultimate, material facts which the plaintiff expects to establish, rather than a general statement of the claim or a repetition of the pleadings.
  - (2) The contentions of law shall be in the form of conclusions of law based on the ultimate facts which the plaintiff expects to establish, and, in addition, shall contain a brief statement of the points of law and a citation of the authorities relied upon in support of each point.
- (d)
- (1) A list setting forth the name, address, and occupation of each of the witnesses whom the plaintiff proposes to call, and a succinct statement of the issue or issues to which the testimony of each witness will relate.
  - (2) The preferred date for the beginning of the trial, and the preferred place or places therefor.
  - (3) An approximation of the time that will be required for the direct examination of the plaintiff's witnesses at each place.

2. Defendant's Response. Within \_\_\_ days after receiving the data referred to in paragraph 1 of this order, the defendant shall furnish the following to the attorney of record for the plaintiff to the trial judge:

- (a) A statement admitting or denying the admissibility of each document listed under paragraph 1(a) of this order, together with the reasons for any denial of admissibility, and a further statement admitting or denying the genuineness of any documents the admissibility of which is disputed.
- (b) A statement (arranged in numbered paragraphs) agreeing to, denying, revising or otherwise commenting on the factual data submitted under paragraph 1(b) of this order.
- (c) A list of the proposed defense exhibits, meeting the requirements of paragraph 1(a) of this order.

(d) A statement setting out any further material matters of fact as to which the defendant believes that there is no substantial controversy between the parties. The paragraphs of this statement shall be numbered.

(e) A memorandum of contentions of fact and law, which shall comply with the requirements set forth in paragraph 1(c) of this order.

(f) A list of the proposed defense witnesses, complying with the requirements of paragraph 1(d)(1) of this order.

(g) A statement indicating the defendant's preferences as to the date and location of the trial.

(h) An estimate of the time likely to be required for the presentation of the direct testimony of the defendant's witnesses, and the cross-examination of the plaintiff's witnesses, at each preferred location.

3. Plaintiff's Reply. Within \_\_\_\_\_ days after receiving the data referred to in paragraph 2 of this order, the plaintiff shall furnish the following to the attorney of record for the defendant and to the trial judge:

(a) A statement agreeing to, denying, or otherwise commenting on any revised or additional factual data submitted under paragraph 2(b) and (d) of this order.

(b) Such observations in rebuttal as the plaintiff may wish to offer respecting the defendant's contentions of fact and law submitted under paragraph 2(e) of this order.

(c) A statement admitting or denying the admissibility of each of the documents listed under paragraph 2(c) of this order, together with the reasons for any denial of admissibility, and a further statement admitting or denying the genuineness of any documents the admissibility of which is disputed.

(d) An estimate of the time likely to be required for the cross-examination of defendant's proposed witness at each preferred location.

4. Form of Compliance. For convenient of reference, submissions in compliance with this order shall follow the format of the order by citing the

numbered paragraph pursuant to which each portion of a particular submission has been prepared.

5. Sanctions. Rule 114(b) provides sanctions for failure or refusal to comply with the requirements of this order.

---

Trial Judge

Standard Pretrial Order on Accounting

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No.

(Filed )

	)	
(Rule 111)	)	Standard
Plaintiff*	)	Pretrial
	)	Order on
v.	)	Accounting
	)	
	)	
The United States	)	
Defendant	)	

IT IS ORDERED as follows:

1. **Plaintiff's Statement.** On or before \_\_, 19\_\_, the plaintiff\* shall furnish to the attorney of record for the defendant and to the commissioner a statement in schedule form showing all the items and figures which the plaintiff intends to prove from books of account or other records. Such statement shall be prepared in accordance with the requirements set out in the following subparagraphs of this paragraph 1:

- (a) The basic figures, costs, and rates from which any claim is computed shall be tabulated in such detail that the statement may be admitted in evidence in lieu of producing the books and records from which the pertinent data were taken.
- (b) The statement shall include a complete computation of the total amount of each claim that is based upon or derived from book of account or other records.
- (c) Each separate portion of the statement shall contain a reference showing the particular books and records from which it was taken.
- (d) Where the statement includes a claim for overhead, factory burden, general expense, or similar items based upon allocations of

entries shown in the books or records, the statement shall itemize such indirect expenses for the period involved, and shall show the accounting method or principle upon which the allocations were made.

(e) Where a claim includes an item of damages for machinery or equipment expense, the statement shall show the type, class, capacity, or other identifying description of each major piece of machinery or equipment involved, and the book value of each item. If book values are not separately shown in the records, or if some basis of value other than book value is used, the statement shall show how the value was determined. The statement shall contain a complete computation of the equipment expenses claimed; and unless the costs incurred or the expenses claimed are fully set forth in the books or records, the statement shall show the accounting method, principle, or authority upon which such computation is based.

(f) The statement shall be accompanied by:

(i) a declaration that the books and records, or any part thereof, upon which the statement is based (including ledgers, journals, payrolls, and the original invoices, vouchers, checks, and other records and documents needed for a verification of the amount claimed or for a determination of the basis upon which the claim is computed) will be made available to the defendant for examination; and

(ii) a notice showing the address where such books and records may be examined by the defendant, together with the name and address of the bookkeeper or accountant who prepared the statement and who will be made available for the furnishing of information regarding such books and records in connection with the defendant's examination.

2. **Defendant's Response.** Within \_\_\_\_ days after receiving the plaintiff's statement in accordance with paragraph 1 of this order, the defendant shall make an examination of the pertinent books of account and other records, and shall furnish to the attorney of record for the plaintiff and to the commissioner a statement showing the results of such examination, or waive challenge of the accuracy of the statement submitted by the plaintiff as reflecting the contents of such books and records and the accuracy of the computations, including allocations, made therefrom. The defendant's

statement shall be prepared in accordance with the requirements set out in the following subparagraphs of this paragraph 2:

(a) If the defendant verifies the items and figures (or any of them) contained in the plaintiff's statement, including the plaintiff's computations and allocations, the defendant shall so report in its statement. Such a report shall not be deemed to be an admission by the defendant of anything more than the accuracy of-

(i) the statement examined as reflecting the contents of the books and records, and

(ii) the allocations and computations based thereon.

(b) If the defendant's examination fails to verify any of the items, figures, allocations, or computations contained in the plaintiff's statement as submitted, the defendant shall specify in its statement each item, figure, allocation or computation not verified, together with such different item, figure, allocation, or computation, if any, derived by the defendant from its examination. The defendant shall set forth in its statement a complete explanation of each exception, and shall specify any alternative methods or theories of accounting upon which the exceptions are based.

(c) The defendant shall be deemed to have waived challenge of the accuracy of all items, figures, allocations, and computations contained in the plaintiff's statement, as submitted, that are not specified in the defendant's statement as the subject of exceptions.

**3. Defendant's Cross-Statement.** In a situation where the defendant (a) has derived any items, figures, allocations, or computations from its examination of the plaintiff's books and records, and (b) intends to offer evidence based upon the material so derived in reduction of any portion of the amount claimed by the plaintiff, or in support of a counterclaim or offset or affirmative defense, or in support of a theory of damages different from that of the plaintiff, the defendant shall prepare a cross-statement reflecting such items, figures, allocations, or computations. The cross-statement shall be prepared in conformity with the requirements set out in subparagraphs (a)-(e) of paragraph 1 of this order, and it shall be furnished to the attorney of record for the plaintiff and to the commissioner within the period prescribed in paragraph 2 of this order.

#### 4. Counterclaim or Offset Based on Defendant's Records.

(a) If the defendant has filed, or intends to file, a counterclaim or offset based on its own books of account or other records, the defendant, within the time prescribed in paragraph 2 of this order, shall furnish to the attorney of record for the plaintiff and to the commissioner a statement prepared in accordance with the requirements set out in paragraph 1 of this order.

(b) Within \_\_\_\_\_ days after receiving the statement referred to in subparagraph (1) of this paragraph 4, the plaintiff shall make an examination of the pertinent books and records of the defendant and shall furnish to the attorney of record for the defendant and to the commissioner a statement showing the results of such examination, or waiver challenge of the accuracy of the defendant's statement as reflecting the contents of such books and records and the accuracy of the computation, including allocations, made therefrom. The provisions of paragraph 2 of this order shall be applicable to the plaintiff's statement.

---

Commissioner

Standard Order Scheduling Pretrial Conference

IN THE UNITED STATES COURT OF CLAIMS  
Trial Division

No.

Filed

	)	
(Rule 111)	)	Standard
Plaintiff*	)	Order
	)	Scheduling
v.	)	Pretrial
	)	Conference
	)	
The United States	)	
(Rule 112) Defendant	)	

IT IS ORDERED as follows:

1. The attorneys for the parties\* are directed to appear before me in room \_\_\_\_\_, U.S. Court of Claims Building, 717 Madison Place, N.W. (Lafayette Square), Washington, D.C., at \_\_\_\_\_ o'clock on 19\_\_, for pretrial conference.

2. The pretrial conference will deal with the following matters:

- (a) incorporating the agreed facts in the record;
- (b) admitting in evidence, or marking for identification, the documentary exhibits which the parties wish to offer (such exhibits should be numbered prior to the conference);
- (c) defining the legal issues that are involved in the litigation;
- (d) defining the factual issues that are to be tried;
- (e) fixing a time and place for the trial;

(f) limiting the number of expert witness and providing for the exchange between the parties prior to the trial of written documents, in narrative or question-and-answer form, by such witnesses comprising their proposed direct testimony; and

(g) such other matters as may aid in the disposition of the case.

3. An attorney appearing at the pretrial conference on behalf of a party should preferably be the attorney who will try the case for such party, be thoroughly familiar with the case, and be authorized to act for his principal.

4. Unless the attorneys for the parties have furnished to each other, in accordance with a previous pretrial order (or otherwise), lists of prospective witnesses, lists of proposed documentary exhibits, statements of supposedly uncontroverted facts, and statements of their contentions concerning the factual and legal issues involved in the case, the attorneys are directed to confer with each other before the pretrial conference and to:

(a) exchange lists containing the names and addresses of all witnesses whom they respectively expect to call at the trial, and indicating as to each witness the issue or issues of fact to which his testimony will be directed (this subparagraph does not apply to witnesses who are to be used solely for the purpose of impeachment or rebuttal);

(b) exchange lists of the documentary exhibits which they respectively intend to offer at the trial, each list to be accompanied by copies of the exhibits listed unless the originals or copies thereof are already in the possession of the opposing party;

(c) prepare a written statement of the agreed facts;

(d) attempt to reach agreement on written statements of the factual and legal issues that are involved in the case.

---

Trial Judge



order, and all such work papers shall be treated as confidential financial information.

(e) Confidential financial information shall not be disclosed by complaint counsel to any other person employed by the Commission until such person has executed an affidavit stating that he has read and understood this protective order and agrees to be bound by the terms thereof. Copies of any such affidavits shall be filed with the Secretary and served upon respondent.

(f) In the event complaint counsel desires that any confidential financial information be divulged to any person who is not an employee of the Commission, complaint counsel shall make written application to the Administrative Law Judge for modification of this protective order and respondent shall be granted ten (10) days after receipt of notice to oppose or otherwise answer said application. The persons to be granted access to the documents and information will be identified in any order granting modification of this protective order.

(g) In the event complaint counsel desires to introduce into evidence by way of documents or testimony any confidential financial information subject to this protective order, complaint counsel shall provide respondent with ten (10) days prior notice to the intent to make such offer so that respondent may seek in camera treatment of said confidential financial information. If advance notice cannot be provided pursuant to this order, respondent shall be so notified at the time of introduction of such documents and the document shall be accorded in camera treatment pending a ruling by the Administrative Law Judge upon any request by respondent for such treatment, which request must be filed within ten (10) days of receipt of such notice.

(h) In the event this proceeding is resolved by means of a consent order or otherwise disposed of prior to an adjudicative hearing on the merits, all confidential financial information shall be destroyed forthwith. Should this proceeding not be so resolved, at such time thereafter (including the completion of any appeals procedures) as this proceeding is finally resolved, the original and all copies of work papers reflecting confidential information, except that which may have been incorporated into the record in this case, shall be destroyed forthwith.

(i) Nothing herein shall be construed to prevent the Administrative Law Judge or any reviewing authority from disclosing such confidential information as may be necessary to reach a decision on any matter raised in connection with this litigation.

\_\_\_\_\_  
Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This order is adapted from a Federal Trade Commission protective order.

\* For protective orders involving confidential commercial information, Executive Order No. 12600 of June 23, 1987 (52 Fed. Reg. 23781), and any agency implementing rules should be consulted.

Form 19-b

## Protective Order

UNITED STATES OF AMERICA  
 Agency  
 Washington, D.C.

[Name of Case]

Docket No.

## PROTECTIVE ORDER

\_\_\_\_\_ having requested the issuance of a protective order with regard to [exhibits they propose to offer in their case in defense and [other party/parties] having stated no objection to such request], IT IS HEREBY ORDERED that:

(1) All of the documents listed below and the information contained therein shall not be disclosed to anyone except the following persons: Respondents and their employees; Respondent's counsel of record; experts retained by Respondent's counsel for purposes of this litigation; [complainant's] counsel of record in this litigation; experts used by [complainant's] counsel for purposes of this litigation; a committee or subcommittee of Congress, in response to official request; or a court, in response to compulsory process. Those persons to whom disclosure is permitted under this Order shall not make further disclosure to anyone.

(2) The documents and information furnished shall be used only in connection with this proceeding. All copies of such documents, together with all notes, memoranda, and other papers reflecting the documents and information, or any part thereof, shall be returned to \_\_\_\_\_'s counsel at the termination of this proceeding.

(3) In the event [complainant's] counsel desire to offer into evidence any document or information subject to this Protective Order. [complainant's] counsel shall provide \_\_\_\_\_ with no less than fifteen (15) days prior notice of their intention to make such offer so that may seek in camera treatment of said documents or information pursuant to of the \_\_\_\_\_'s Rules of Practice .

(4) In the event the documents or information are officially requested by a Committee or subcommittee of Congress, or demanded by compulsory process of a court, the court or committee or subcommittee will be advised that

considers the information to be confidential, and \_\_\_\_\_ will be provided with thirty (30) days prior notice where possible, and in any event, as much prior notice as can reasonably be given.

The following [proposed exhibits] are covered by this Protective Order

<u>EX Number</u>	<u>Description</u>
.....	
205	Reported 1978 Advertising Expenditures for _____ manufacturers
206	_____ 's Corporation Statement of Income, Years Ended October 31, 1979, 1980.

IT SHOULD BE UNDERSTOOD THAT THIS PROTECTIVE ORDER COVERS THE PREHEARING STAGE OF THIS PROCEEDING ONLY, AND IN NO WAY INTIMATES THE JUDGE'S RULINGS WHEN AND IF CERTAIN EXHIBITS ARE OFFERED, AND THE APPLICABILITY OF §[ ] of the [Commission's] Rules is raised. MOREOVER, this protective order is not intended to impede proper preparation of this case and if any provision in this order seriously interferes with [complainant's] [intervenor's] [other parties'/participants'] preparation, relief may be sought.

**NOTE:** This order is adapted from a Federal Trade Commission protective order.

Form 19-c

Protective Order, Re: Deposition

UNITED STATES OF AMERICA  
Agency  
Washington, D.C.

[Name of Case]  
[or other identification]

Docket No.

[PROTECTIVE ORDER/HEADING]

Certain documents furnished by deponents pursuant to the subpoenas, identified hereinafter by the Exhibit Number which was assigned at the depositions, are hereby placed under a protective order. The terms of the protective order are set forth herein following the identification of the documents which are covered by the order.

[Sancho Panza] Deposition Exhibits 5, 7, 9, 10, 12, 23, . . . .

[Dulcinea] Deposition Exhibits 1, 2, 7 . . . .

. . . .

IT IS ORDERED AS FOLLOWS:

1. The above identified exhibits shall be maintained in confidence by the [LaMancha] [Regional Office] of the [Federal Windmill Commission] and be made available only to the following employees of that Office: [Attorney Don Quixote, Investigator Quasimodo Jones, Secretary Earnest Torquimada], \_\_\_\_\_. The foregoing persons shall use the identified documents only for purposes of this proceeding and such documents shall be made available to other persons within the [Federal Windmill Commission] only on written authorization of the assigned Administrative Law Judge.

2. All copies of the identified documents shall be returned to each deponent who produced the identified documents pursuant to subpoena, or to counsel for each deponent, at the conclusion of this proceeding. For purposes of this protective order, this proceeding shall be deemed concluded when a

final order of the [Commission] shall have been served upon respondents herein.

3. Copies of any identified exhibits offered or received in evidence during formal trial of this matter shall not thereafter be subject to the terms of this protective order.

\_\_\_\_\_  
Administrative Law Judge

[Date] \_\_\_\_\_

**NOTE:** This order is adapted from a Federal Trade Commission protective order.

## Form 19-d

## Protective Order

## Stipulated Protective Order

The Commission Trial Staff ("Staff") and Intervenor, \_\_\_\_\_ have sought to obtain certain documents and information from Corporation and certain of its affiliates ("the Companies") in this proceeding. The Companies assert that certain of the documents and information requested contain confidential and proprietary information. This Stipulated Protective Order is a device to facilitate and expedite the handling of this proceeding and it merely reflects agreement by counsel for the active participants at this point as to the manner in which "PROTECTED MATERIALS," as that term is defined in this order, are to be treated. This action is not intended to constitute an agreement on the merits concerning confidentiality of any of the "PROTECTED MATERIALS," and the parties shall not be deemed by taking such action to have waived any arguments with respect to whether the "PROTECTED MATERIALS" are confidential or proprietary in nature.

1. All documents and information furnished subject to the terms of this order hereinafter shall be referred to as "PROTECTED MATERIALS." However, "PROTECTED MATERIALS" shall not include any information or document contained in the public files of the Federal Energy Regulatory Commission ("the Commission") or any other federal or state agency. "PROTECTED MATERIALS" also shall not include documents or information which at, or prior to, disclosure in these proceedings, is or was public knowledge, or which becomes public knowledge as a result of publication or disclosure by the Companies.

2. The Companies may designate as "PROTECTED MATERIALS" those documents or discovery materials or portions thereof produced by them which in good faith they believe contain confidential or proprietary information. Designation shall be accomplished by marking the documents or other discovery materials or portions thereof with the words "PROTECTED MATERIALS, FERC DOCKET NO. \_\_\_\_\_." Any notes, memoranda, summaries, abstracts, studies or other information derived from such "PROTECTED MATERIALS" or portions thereof, other than a list of the "PROTECTED MATERIALS," shall be similarly marked, and reasonable precautions shall be taken to ensure that any such notes, memoranda, summaries, abstracts, studies or other information are not viewed by any persons except those to whom "PROTECTED MATERIALS" may be disclosed under paragraph 4. Upon request of the Staff, or \_\_\_\_\_, the Companies shall state the reason for designating as "PROTECTED MATERIALS" documents or discovery materials or portions thereof and shall

provide a sworn affidavit stating that, to their knowledge and belief, the "PROTECTED MATERIALS" or portions thereof are not already on file with the Commission or any other federal or state agency or otherwise available to the public.

3. Unless and until otherwise agreed or otherwise ordered by the Presiding Judge, the Commission, or a court of competent jurisdiction, all documents and other discovery materials or portions thereof that have been designated "PROTECTED MATERIALS," and any notes, memoranda, summaries, abstracts, studies or other information derived therefrom, shall be used only in connection with this litigation in accordance with this Stipulated Protective Order and may be inspected by or disclosed to only the persons described in Paragraph 4 under the conditions herein established.

4. a. "PROTECTED MATERIALS" may be disclosed to and used by attorneys of record for Staff and \_\_\_\_\_ in this proceeding or in any appellate proceeding resulting from this proceeding and persons who are regularly employed in such attorneys' offices and engaged in or supervising the conduct of this proceeding in accordance with this Stipulated Protective Order.

b. "PROTECTED MATERIALS" also may be disclosed to and used by Staff's and \_\_\_\_\_ technical experts, consultants, expert witnesses, other witnesses, and persons regularly employed in their respective offices who are involved in this proceeding in accordance with this Stipulated Protective Order. The attorney for Staff or \_\_\_\_\_ shall secure and provide to counsel for the Companies a certificate from each such person in the form attached hereto stating that he or she has read this Stipulated Protective Order, and that he or she may not divulge any "PROTECTED MATERIALS," or any portion thereof, or any information derived therefrom, except in accordance with this Stipulated Protective Order.

In the event that any person to whom disclosure of "PROTECTED MATERIALS" has been made ceases to be engaged in this proceeding, access to such materials by such person shall be terminated. However, any person who has executed the certificate in the form attached hereto shall continue to be bound by the provisions of this Stipulated Protective Order even if no longer so engaged.

c. Any party or participant who receives "PROTECTED MATERIALS" pursuant to this Stipulated Protective Order will make no more than five copies of each document. Such party or participant will keep a log which sets forth the number of copies of each document which were made, and will provide a copy of that log to the Companies at the termination of this proceeding and any related appellate litigation. The parties or participants will negotiate in good

faith concerning the reproduction of additional copies of "PROTECTED MATERIALS" for use as exhibits in depositions, in testimony or during the hearing.

5. a. If a reviewing party tenders for filing with the Presiding Administrative Law Judge, the Commission or any court, any written testimony, exhibit, brief or other submission that includes, incorporates, or refers to "PROTECTED MATERIALS," all portions thereof referring to such materials shall be marked "PROTECTED MATERIALS" and filed and served in sealed envelopes or other appropriate containers endorsed to the effect that they are sealed pursuant to this Stipulated Protective Order.
- b. Unless objection to disclosure is waived by counsel for the Companies, "PROTECTED MATERIALS" or portions thereof may be served, offered, or introduced into evidence, or otherwise disclosed only in an in camera portion of this proceeding closed to all persons except those listed in paragraph 4.

The Presiding Judge shall determine, subject to such review as may be provided by the Commission's regulations and by any applicable law, whether or to what extent the "PROTECTED MATERIALS" or portions thereof will remain in camera, will be made public, or will be stricken or excluded from the record. Pending such determination, which shall be subject to such review as may be provided by Commission regulations and by any applicable law, any submission that is served, offered, or introduced in camera shall be subject to the provisions of this Stipulated Protective Order. That portion of the hearing transcript relating to in camera proceedings conducted pursuant to the Stipulated Protective Order shall be sealed and subject to this Stipulated Protective Order, unless otherwise ordered by the Presiding Judge.

6. "PROTECTED MATERIALS" may be disclosed to employees of the Commission's Assistant General Counsel for General Legal Services and the Office of Public Information for purposes of review pursuant to requests filed under the Freedom of Information Act, 5 U.S.C. §552(a). Such employees shall thoroughly review all "PROTECTED MATERIALS" covered by requests filed under the Freedom of Information Act and determine whether the exemptions listed in 5 U.S.C. §552(b) apply. Documents covered by any such exemption shall not be released. In addition, such employees shall not authorize the release of such "PROTECTED MATERIALS" to any other person without first providing the Companies notice in writing at least 5 working days prior to such release of the intention to release such "PROTECTED MATERIALS." In the event of such notice, the Companies shall have the right to apply to the Commission for a determination that the

"PROTECTED MATERIALS" come within the exceptions listed in 5 U.S.C. §552(b) and should not be released or to take such other action as they deem appropriate.

7. a. In the event that Staff or intervenors wish to disclose "PROTECTED MATERIALS" to any person to whom disclosure is not authorized by this Stipulated Protective Order, or wish to object to the designation of certain information or material as "PROTECTED MATERIALS," Staff or intervenors will first notify in writing counsel for the Companies and the Presiding Judge, identifying with particularity each of such "PROTECTED MATERIALS" and state the reason for the intended disclosure or objection. Staff, intervenors and the Companies will then undertake good faith negotiations in order to resolve any disputes as to such disclosures or the validity of the claim to protection.

Where these negotiations produce agreement, such agreement will be filed with the Presiding Judge, and other reviewing parties may make use of these materials, provided that they enter into similar agreements with the Companies.

- b. If the Staff, intervenors and the Companies fail to reach agreement with respect to the disclosure reference in paragraph 7a, or the Companies otherwise maintain that the information should continue to be classified as "PROTECTED MATERIALS," the Companies shall notify in writing the Staff and intervenors of their position within 5 days of the notice in paragraph 7a. The Staff or intervenors shall then file, within 10 days of such notice, a motion requesting that the Presiding Judge review the documents in camera and determine whether they should be protected from disclosure. The Companies shall file a response to such motion within 10 days after the motion is filed. This Stipulated Protective Order does not change the burden of proof under applicable law in determining whether designated documents or information or portions thereof are entitled to be so protected.

8. In the event that the Presiding Judge at any time in the course of this proceeding finds sua sponte or in response to a motion that all or part of the "PROTECTED MATERIALS" are not confidential or proprietary, those materials shall nevertheless be subject to the protection afforded by this order for 10 working days, unless otherwise ordered, from the date of issuance of the Judge's decision. Neither the Companies, Staff or intervenors waive their rights to seek additional administrative or judicial remedies after the Presiding Judge's decision.

9. Nothing in the foregoing provisions of this Stipulated Protective Order shall be deemed to preclude any person from seeking and obtaining, on an

appropriate showing, such additional protection or relief as may be available under applicable law.

10. All "PROTECTED MATERIALS" in the possession of Staff or intervenors and all copies made thereof shall be returned to the Companies at the termination of this proceeding and any related appellate litigation, except to the extent that Staff, intervenors and the Companies shall agree otherwise. In addition, at the termination of this proceeding and any related appellate litigation, the Staff and intervenors shall destroy any notes, memoranda, and other documents and information derived from "PROTECTED MATERIALS," other than lists of such "PROTECTED MATERIALS," and certify in writing to counsel for the Companies that such destruction has been accomplished. Staff and intervenors shall have no obligation to return any material which was originally designated as "PROTECTED MATERIALS" under this Stipulated Protective Order but as to which a final order, no longer subject to review, has been issued which concludes that the material in question is not confidential or proprietary.

11. Nothing in this Stipulated Protective Order shall be construed to prevent the parties from attempting to obtain through discovery in any other judicial or administrative action or proceeding all or any of the "PROTECTED MATERIALS" returned to the Company pursuant to paragraph 10, above.

12. In the event that a document is supplied by the Companies which the Companies inadvertently failed to mark as "PROTECTED MATERIALS," upon request, FERC and \_\_\_\_\_ shall mark any such document as "PROTECTED MATERIALS" and the document and all copies thereof shall be subject to the provisions of this Stipulated Protective Order.

**NOTE:** This is adapted from an opinion/protective order issued by an ALJ of the Federal Energy Regulatory Commission. (See, 32 FERC P63,091; 1985 FERC LEXIS 1377 (1985).

## Judge's Docket Sheet

AGENCY

JUDGE'S DOCKET SHEET

JudgeCase Name [Caption]

Item

<u>Number</u>	<u>Date</u>	<u>Entry</u>
J-1	3/12/89	Notice of Assignment
J-2	.....	
J-6	4/7/89	Complainant's motion to Vacate Order Granting Simplified Proceedings
J-7	4/11/89	Order Vacating Order Granting Simplified Proceedings
J-8	4/15/89	Motion for Continuance
J-9	4/19/89	Order Rescheduling Hearing
J-10	4/19/89	Letter from Judge stating that no further continuances should be requested.
J-11	5/14	Complainant's Requests for Admission
J-12	.....	.....

**NOTE:** This was adapted from the Judge's Docket Sheet used by the Occupational Safety and Health Review Commission.

Form 21-a

## Notice of Judge's Decision

## NOTICE OF DECISION

In Reference To:Caption of case

Docket No.

Enclosed is a copy of my decision. It will be submitted to the [Commission's Executive Secretary] on date. The decision will become the final order of the [Commission] at the expiration of thirty (30) days from the date of docketing by the [Executive Secretary], unless within that time [a Member of the Commission] directs that it be reviewed. All parties will be notified of the date of docketing.

Any party adversely affected or aggrieved by the decision may file a petition for discretionary review. *A petition may be filed with this Judge within twenty (20) days from the date of this notice. Thereafter, any petition must be filed with the [Commission's] [Executive Secretary] within twenty (20) days from the date of the Executive Secretary's notice of docketing. The [Executive Secretary's] address is as follows:*

[Executive Secretary]

. . . .

[Washington, DC 20006-1246]

The full text of the rule governing the filing of a petition for discretionary review is [29 CFR §2200.91]. It is appended hereto for easy reference. The rule also prescribes requirements concerning: (a) any cross-petition for discretionary review; (b) the contents of a petition; (c) the effect of a failure to file a petition; (d) statements in opposition to a petition, and (e) the number of copies of any document that may be filed. There are closely related rules which are published in 29 CFR §2200.90 and \_\_\_\_\_. Rule 90 concerns the contents of a decision of this kind; the aforementioned docketing of this Judge's report by the Executive Secretary; and the correction of errors and relief from default. Rule \_\_\_ describes review by the [Commission]--its jurisdiction and the standards that are applied concerning issues that are raised by the parties or otherwise may exist. The text of these rules is also appended.

---

Administrative Law Judge, OSHRC

**NOTE:** Adapted from Notice used by the Occupational Safety and Health Review Commission.

## Form 21-b

**Notice of Judge's Decision  
(Unfavorable decision, court remand case)**

Notice of Administrative Law Judge Decision--Denial

**PLEASE READ CAREFULLY**Name of Claimant  
Street Address  
City, State

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

**If You Disagree With This Decision:**

If you disagree with this decision, you may appeal to the Appeals Council. You must do this by filing written Exceptions. Exceptions are your statements explaining why you disagree with the decision of the Administrative Law Judge.

– Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals . . . .

– You must file your written exceptions within 30 days from the date you receive this notice. The Appeals Council assumes that you receive this notice within 5 days after the date at the end of this notice unless you show that you did not receive it within the 5-day period.

– If you need more time to file your written exceptions, you must file a written request for additional time with the Appeals Council within 30 days of the date you receive this notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

– Please include the Social Security Number(s) shown on the decision on any paper you send to the Appeals Council.

– The Appeals Council will consider your exceptions and the parts of the decision that you disagree with. The Appeals Council may also consider those parts which you do not disagree with.

– If the Appeals Council concludes that further action is necessary, it will either return your case to an Administrative Law Judge, for further action or issue a decision. If the Appeals Council issues a decision, that decision may be either more or less favorable to you than the decision of the Administrative Law Judge.

– If the Appeals Council concludes that there is no reason to change the Administrative Law Judge's decision, it will notify you in writing why your exceptions do not warrant a change.

– If you submit written exceptions and the Appeals Council does not change the decision of the Administrative Law Judge, that decision becomes the final decision of the Secretary after remand.

– Any future claims you may file will not change a final decision on this claim if the facts and issues are the same.

### **If You Do Not File Written Exceptions:**

Even if you do not file written exceptions within 60 days from the date shown below, the Appeals Council may review your case on its own motion. The Appeals Council will notify you if it decides to review your case and will advise you what action it proposes to take.

If the Appeals Council does not review your case on its own motion and you do not submit exceptions, we will forward a copy of the decision and transcript of the record in your case to the United States Attorney, for filing with the court.

You have the right to pursue your civil action with the court.

### **New Application:**

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to

this decision. Therefore, if you disagree with this decision, you should file your exceptions within 30 days.

If you have any questions, please contact \_\_\_\_\_.

This Notice and enclosed copy of  
decision mailed \_\_\_\_\_.

cc: Name & Address of Representative

cc: [as applicable]

**NOTE:** This form is adapted from a notice used by the Social Security Administration.

Form 22

## Order Appointing Settlement Judge

UNITED STATES OF AMERICA  
Agency

[Name of Case]

Docket No.

## ORDER

1. There being no objection, the Secretary of/complainant's/respondent's motion for the appointment of a settlement judge pursuant to [29 CFR §2200.101] is hereby granted. [Because there has been no objection, there is an implied consent for the use of the settlement judge procedure.]

. It is therefore determined that there is a reasonable prospect of settlement of at least a substantial portion of this case with the assistance of mediation by a settlement judge.

2. The case is hereby assigned to Administrative Law Judge , who will serve as the settlement judge, pursuant to applicable rules and regulations. Judge \_\_\_\_\_'s service as settlement judge in this case and related negotiations will be for a period not to exceed 45 days, unless such period is extended pursuant to applicable rules and regulations.

\_\_\_\_\_  
Chief Administrative Law Judge

[Date] \_\_\_\_\_

NOTE: This is adapted from an Order issued by the Chief Administrative Law Judge of the Occupational Safety and Health Review Commission.

## Form 23

## Order re: Filing of Electronic Word Processing Files in Complex Case

UNITED STATES OF AMERICA  
Agency

[Name of Case]

Docket No.

## ORDER

A review of the complaint in this case indicates a likelihood that this case could become factually and legally complex. Therefore, in order to address the issues more readily, the parties are directed to provide the Judge, for each document greater than two (2) pages in length, an electronic copy of the document on a MS/Dos 5¼ or other suitable floppy diskette in WordPerfect 5.0 format, or in a format capable of being converted by WordPerfect 5.0. Diskettes need not be furnished for complaint and answer. The diskette(s) shall be transmitted to the \_\_\_\_\_ in an envelope or mailer, designed for that purpose, at the time of filing the printed document. Receipt of the diskette does not constitute filing or affect the time of the filing of the document (hard copy).

IT IS SO ORDERED.

---

 Administrative Law Judge

[Date] \_\_\_\_\_

NOTE: This form is adapted from an order used by a judge of the United States Court of Federal Claims.



## APPENDIX II

### SELECTED BIBLIOGRAPHY: ALTERNATIVE DISPUTE RESOLUTION

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## APPENDIX III

### SELECTED BIBLIOGRAPHY: TRIAL MANUALS, STYLE MANUALS, AND WORKS ON WRITING

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## APPENDIX IV

### BIBLIOGRAPHY: MATERIALS RELATED TO ADMINISTRATIVE ADJUDICATION

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#### ACUS Recommendations (Codified at 1 CFR §305)

- \* Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review By the Agency*
- \* Recommendation 69-6, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*
- \* Recommendation 69-9, *Recruitment and Selection of Hearing Examiners; Continuing Training for Government Attorneys and Hearing Examiners; Creation of a Center for Continuing Legal Education in Government*
- \* Recommendation 72-6, *Civil Money Penalties as a Sanction*
- \* Recommendation 74-1, *Subpena Power in Formal Rulemaking and Formal Adjudication*
- \* Recommendation 78-2, *Procedures for Determining Social Security Claims*
- \* Recommendation 78-3, *Time Limits on Agency Actions*
- \* Recommendation 79-3, *Agency Assessment and Mitigation of Civil Money Penalties*
- \* Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*

- \* Recommendation 86-2, *Use of Federal Rules of Evidence in Federal Agency Adjudications*
- \* Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*
- \* Recommendation 86-4, *The Split-Enforcement Model for Agency Adjudication*
- \* Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*
- \* Recommendation 87-12, *Adjudication Practices and Procedures of the Federal Bank Regulatory Agencies*
- \* Recommendation 88-5, *Agency Use of Settlement Judges*
- \* Recommendation 90-1, *Civil Money Penalties for Federal Aviation Violations*
- \* Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendations*
- \* Recommendation 91-8, *Adjudication of Civil Penalties Under the Federal Aviation Act*
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## APPENDIX V

### CITATIONS TO PROCEDURAL RULES

Agriculture .....	7 CFR §§1.27-.28, 1.130-.151, Parts 47, 50, 202, 900
Architectural and Transportation	
Barriers Compliance Board .....	36 CFR Part 1150
Commerce	
International Trade Administration.....	15 CFR Part 354
National Oceanic and Atmospheric Administration .....	15 CFR Part 904
Commodity Futures Trading Commission.....	17 CFR Parts 10, 12, 13
Consumer Product Safety Commission.....	16 CFR Parts 1025, 1051, 1052
Environmental Protection Agency .....	40 CFR Parts 22, 25, Parts 104, 108, §124.71, Parts 164, 209
Federal Communications Commission .....	47 CFR Part 1
Federal Deposit Insurance Corporation .....	12 CFR Part 308
Federal Emergency Management Agency .....	44 CFR Parts 1, 68
Federal Energy Regulatory Commission.....	18 CFR Part 385
Federal Labor Relations Authority .....	5 CFR Parts 2422, 2423
Federal Maritime Commission .....	46 CFR Part 502
Federal Mine Safety and Health Review Commission .....	29 CFR Part 2700
Federal Reserve Board.....	12 CFR Parts 262, 263
Federal Trade Commission.....	16 CFR §§1.7-.26, Part 3, §4.7
Food and Drug Administration (HHS).....	21 CFR Parts 10, 12, 16
Housing and Urban Development.....	24 CFR Parts 26, 1720, §3282.152
Interior .....	43 CFR Part 4; 50 CFR Part 11
International Trade Commission .....	19 CFR Part 210
Interstate Commerce Commission .....	49 CFR Parts 1100 - 1118

## Justice

Drug Enforcement Administration .....	21 CFR
	§§1301.51-.57,
	§§1303.31-37,
	§§1311.51-.53,
	§§1312.41-.47,
	§§98.310-.314,
	Part 580;
	41 CFR Part 50-203
	Part 1316
Other .....	28 CFR §48.10

## Labor

Black Lung Benefits Cases .....	20 CFR §§725.350-.483
Longshoremen's Compensation Cases .....	20 CFR
	§§702.301-.394
Office of Federal	
Contract Compliance .....	41 CFR §60-1.21-26,
	Part 60-30
Other Cases .....	29 CFR §4.10, Part 6,
	§§40.101-.272, 98.310-314,
	Part 580; 41 CFR Parts 50-203
Merit Systems Protection Board.....	5 CFR Parts 1201,
	1203, 1209
National Credit Union Administration .....	12 CFR Part 747
National Labor Relations Board.....	29 CFR Parts 101, 102
National Transportation Safety Board .....	49 CFR Part 821
Nuclear Regulatory Commission.....	10 CFR Part 2
Occupational Safety and Health	
Administration (Labor).....	29 CFR Parts 1905, 1911
Occupational Safety and Health Review Commission .....	29 CFR
	Part 2200
Postal Rate Commission .....	39 CFR Part 3001
Postal Service .....	39 CFR Parts 912-966
Securities and Exchange Commission .....	17 CFR §§200.110-
	.114, Parts 201, 202
Small Business Administration .....	13 CFR Parts 101.9, Parts
	134, 142
Social Security Administration (HHS) .....	20 CFR
	§§404.900-.996,
	§§410.601-.707,
	§§416.1400-.1494;
	42 CFR §§405.701-.750,

	§§405.801-.872,
	§§405.1801-.1889
<b>Transportation</b>	
Coast Guard.....	46 CFR §5.501-.807
Federal Aviation Administration .....	14 CFR Parts 11, 13.63
Federal Highway Administration .....	49 CFR Parts 386, 389
Maritime Administration.....	46 CFR Part 201
National Highway Traffic Safety Admin .....	49 CFR Parts 511,553
Office of the Secretary .....	14 CFR Part 302
<b>Treasury</b>	
Bureau of Alcohol, Tobacco and Firearms .....	27 CFR §§178.71-.82,Part 200
Comptroller of the Currency .....	12 CFR Part 19
Internal Revenue Service.....	26 CFR §601.601; 31 CFR §§10.50-76

**NOTE:** Several of the above agencies, as well as other agencies with financial assistance programs, have published rules of practice for formal (ALJ) hearings to effectuate title VI of the Civil Rights Act, which guarantees nondiscrimination in such programs. Citations for these rules can be found in the CFR Index under the heading "civil rights."



## APPENDIX VI

### ADMINISTRATIVE PROCEDURE ACT Title 5, U.S. Code Chapter 5--Administrative Procedure

\* \* \* \*

§551. Definitions.

§553. Rulemaking.

§554. Adjudications.

§555. Ancillary matters.

§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

§558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

§559. Effect on other laws; effect of subsequent statute.

\* \* \* \*

#### §551. Definitions

For the purpose of this subchapter

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381; Pub. L. 94-409, §4(b), Sept. 13, 1976, 90 Stat. 1247.)

\* \* \* \*

### §553. Rulemaking

(a) This section applies, according to the provisions thereof, except to the extent that there is involved

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply

Except when notice or hearing is required by statute, this subsection does not apply

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

\* \* \* \*

### §554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a<sup>1</sup> administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

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<sup>1</sup>So in original.

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 384; Pub. L. 95-251, §2(a)(1), Mar. 27, 1978, 92 Stat. 183.)

\* \* \* \*

### §555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the

witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 385.)

\* \* \* \*

### **§556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision**

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may

(1) administer oaths and affirmations;

(2) issue subpoenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes

administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 386; Pub. L. 94-409, §4(c), Sept. 13, 1976, 90 Stat. 1247; Pub. L. 95-251, §2(a)(1), Mar. 27, 1978, 92 Stat. 183; Pub. L. 101-552, §4(a), Nov. 15, 1990, 104 Stat. 2737.)

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### **§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record**

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications;

and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 387; Pub. L. 94-409, §4(a), Sept. 13, 1976, 90 Stat. 1246.)

\* \* \* \*

### **§558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses**

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in

accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 388.)

\* \* \* \*

### **§559. Effect on other laws; effect of subsequent statute**

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5372, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5372, or 7521 of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 388; Pub. L. 90-623, §1(1), Oct. 22, 1968, 82 Stat. 1312; Pub. L. 95-251, §2(a)(1), Mar. 27, 1978, 92 Stat. 183; Pub. L. 95-454, title VIII, §801(a)(3)(B)(iii), Oct. 13, 1978, 92 Stat. 1221.)

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## **Chapter 7--Judicial Review**

**§701. Application; definitions.**

**§702. Right of review.**

**§703. Form and venue of proceeding.**

**§704. Actions reviewable.**

**§705. Relief pending review.**

**§706. Scope of review.**

### **§701. Application; definitions**

(a) This chapter applies, according to the provisions thereof, except to the extent that

- (1) statutes preclude judicial review; or
  - (2) agency action is committed to agency discretion by law.
- (b) For the purpose of this chapter

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

### **§702. Right of review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.)

### **§703. Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.)

### **§704. Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

### §705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

### §706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

\* \* \* \*

### §1305. Administrative law judges

For the purpose of section<sup>2</sup> 3105, 3344, 4301(2)(D), and 5372 of this title and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, the Office of Personnel Management may, and for the purpose of section 7521 of this title, the Merit Systems Protection Board may investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees as established for the courts of the United States.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 402; Pub. L. 90-83, §1(3), Sept. 11, 1967, 81 Stat. 196; Pub. L. 95-251, §2(a)(1), (b)(1), Mar. 27, 1978, 92 Stat. 183; Pub. L. 95-454, title VIII, §801(a)(3)(B)(iii), title IX, §906(a)(12), Oct. 13, 1978, 92 Stat. 1221, 1225.)

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<sup>2</sup>So in original. Probably should be "sections".

### §3105. Appointment of administrative law judges

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 415; Pub. L. 95-251, §2(a)(1), (b)(2), (d)(1), Mar. 27, 1978, 92 Stat. 183, 184.)

\* \* \* \*

### §3344. Details; administrative law judges

An agency as defined by section 551 of this title which occasionally or temporarily is insufficiently staffed with administrative law judges appointed under section 3105 of this title may use administrative law judges selected by the Office of Personnel Management from and with the consent of other agencies.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 425; Pub. L. 95-251, §2(a)(1), (b)(2), Mar. 27, 1978, 92 Stat. 183; Pub. L. 95-454, title IX, §906(a)(2), Oct. 13, 1978, 92 Stat. 1224.)

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### §5372. Administrative law judges

(a) For the purposes of this section, the term "administrative law judge" means an administrative law judge appointed under section 3105.

(b)(1) There shall be 3 levels of basic pay for administrative law judges (designated as AL-1, 2, and 3, respectively), and each such judge shall be paid at 1 of those levels, in accordance with the provisions of this section. The rates of basic pay for those levels shall be as follows:

AL-3, rate A 65 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate B 70 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate C 75 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate D 80 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate E 85 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-3, rate F 90 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-2 95 percent of the rate of basic pay for level IV of the Executive Schedule.

AL-1 The rate of basic pay for level IV of the Executive Schedule.

(2) The Office of Personnel Management shall determine, in accordance with procedures which the Office shall by regulation prescribe, the level in which each administrative-law-judge position shall be placed and the qualifications to be required for appointment to each level.

(3)(A) Upon appointment to a position in AL-3, an administrative law judge shall be paid at rate A of AL-3, and shall be advanced successively to rates B, C, and D of that level upon completion of 52 weeks of service in the next lower rate, and to rates E and F of that level upon completion of 104 weeks of service in the next lower rate.

(B) The Office of Personnel Management may provide for appointment of an administrative law judge in AL-3 at an advanced rate under such circumstances as the Office may determine appropriate.

(c) The Office of Personnel Management shall,<sup>3</sup> prescribe regulations necessary to administer this section.

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<sup>3</sup>So in original. The comma probably should not appear.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 473, §5362; Pub. L. 95-251, §2(a)(1), (b)(1), Mar. 27, 1978, 92 Stat. 183; renumbered §5372 and amended Pub. L. 95-454, title VIII, §801(a)(3)(A)(ii), title IX, §906(a)(2), Oct. 13, 1978, 92 Stat. 1221, 1224; Pub. L. 101-509, title V, §529 [title I, §104(a)(1)], Nov. 5, 1990, 104 Stat. 1427, 1445.)

#### AMENDMENTS

1990 Pub. L. 101-509 amended section generally. Prior to amendment, section read as follows: "Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings and in accordance with subchapter III of this chapter and chapter 51 of this title."

\* \* \* \*

#### §7521. Actions against administrative law judges

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are

- (1) a removal;
- (2) a suspension;
- (3) a reduction in grade;
- (4) a reduction in pay; and
- (5) a furlough of 30 days or less; but do not include
  - (A) a suspension or removal under section 7532 of this title;
  - (B) a reduction-in-force action under section 3502 of this title; or
  - (C) any action initiated under section 1215 of this title.

(Added Pub. L. 95-454, title II, §204(a), Oct. 13, 1978, 92 Stat. 1137, and amended Pub. L. 101-12, §9(a)(2), Apr. 10, 1989, 103 Stat. 35.)

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